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SUPREME COURT OF THE UNITED STATES.

[illegible]

No. [illegible]

THE UNITED STATES, APPELLANT,

vs.

THE NORTHERN PACIFIC RAILROAD COMPANY, THE NORTHERN PACIFIC RAILWAY COMPANY, AND EDWIN D. MORGAN AND OTHERS, AS RECEIVERS OF THE NORTHERN PACIFIC RAILROAD COMPANY.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

FILED SEPTEMBER [illegible], 1894.

17522

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1899.

No. 408.

THE UNITED STATES, APPELLANT,

vs.

THE NORTHERN PACIFIC RAILROAD COMPANY, THE NORTHERN PACIFIC RAILWAY COMPANY, AND EDWIN H. McHENRY AND FRANK G. BIGELOW, AS RECEIVERS OF THE NORTHERN PACIFIC RAILROAD COMPANY.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

INDEX.

	Original.	Print.
Caption to transcript from United States circuit court of appeals	*a*	*a*
Caption to transcript from United States circuit court	*b*	*a*
Stipulation as to bill of complaint	..	1
Order, leave to file substituted bill of complaint	..	2
Substituted bill of complaint	..	3
Portions of act of Congress of July 2, 1864, granting lands, etc	..	5
Section 2 of joint resolution approved May 7, 1866	..	6
Section 3 of act of Congress of May 5, 1864	..	9
Exhibit A (contract between Northern Pacific Railroad Company et al. and Western Land Association, July 9, 1870)	..	11
Exhibit A1 (deed Lake Superior and Mississippi Railroad Company to Northern Pacific Railroad Company, January 1, 1872)	..	16
Exhibit B (contract between Lake Superior and Mississippi Railroad Company and Northern Pacific Railroad Company, January 1, 1872)	..	25
Exhibit B1 (lease Lake Superior and Mississippi Railroad Company to Northern Pacific Railroad Company, May 1, 1872)	..	34
Exhibit C (contract between Northern Pacific Railroad Company et al. and William H. Rhawn et al., August 9, 1876)	..	57
Marshal's return to subpœna	..	64
Subpœna	..	64
Appearance of Northern Pacific Railroad Company and Northern Pacific Railway Company	..	65
Appearance of receivers	..	66
Disclaimer of the Northern Pacific Railway Company	..	66
Order substituting Eugene G. Hay for E. C. Stringer as solicitor for complainant	..	67

	Original.	Print.
Stipulation that replication to original answer shall stand as replication to amended answer	..	68
Replication	..	69
Stipulation that answer to original bill as amended shall stand as answer to the amended bill	..	70
Stipulation to amend answer	..	70
Order granting leave to amend answer	..	74
Joint and several answer of Northern Pacific Railroad Company and receivers	..	78
Agreed statement of facts	..	102
Letter J. Perham to Secretary of Interior, March 6, 1865	..	104
Letter Secretary of Interior to Commissioner General Land Office, March 9, 1865	..	104
Letter Acting Commissioner General Land Office to Secretary of Interior, June 22, 1865	..	105
Copy of by-law of Northern Pacific Railroad Company, January 11, 1865, as to powers conferred upon its president	..	109
Portions of act of Congress approved July 2, 1864	..	114
Joint resolution of Congress approved May 31, 1870	..	118
Chapter 69 of Special Laws of Minnesota for 1865	..	119
Chapter 485 of Private and Local Laws of Wisconsin for 1865	..	120
Chapter 253 of Private and Local Laws of Wisconsin for 1870	..	121
Chapter 139 of Private and Local Laws of Wisconsin for 1872	..	122
Letter Secretary of Interior to Commissioner General Land Office, August 13, 1870	..	124
Letter Wilson, Commissioner, to register and receiver, Bayfield, September 15, 1870	..	125
Certificate of president of Northern Pacific Railroad Company as to line of definite location	..	126
Affidavit of engineer-in-chief Northern Pacific Railroad Company	..	127
Letter Villard, president, to Secretary of Interior, July 3, 1882	..	127
Letter Secretary of Interior to Commissioner General Land Office, November 22, 1882	..	129
Letter Harrison, Acting Commissioner, to register and receiver, Bayfield, January 5, 1883	..	129
Letter McFarland, Commissioner, to register and receiver, June 22, 1883	..	131
Letter McFarland, Commissioner, to register and receiver, October 20, 1883	..	133
Resolution board of directors Northern Pacific Railroad Company, August 28, 1884	..	133
Letter Sparks, Commissioner, to register and receiver, Ashland, February 3, 1887	..	134
Letter Secretary of the Interior to the President, September 14, 1882	..	137
Approval of the President of recommendations of Secretary of Interior on report of commissioners, September 16, 1882	..	138
Letter Secretary of the Interior to the President, September 16, 1882	..	138
Approval of the President, January 31, 1884	..	139
Letter Secretary of the Interior to the President, February 6, 1885	..	139
Approval of the President, February 6, 1885	..	140
Contract between Northern Pacific Railroad Company and Lake Superior and Mississippi Railroad Company, April 21, 1874	..	141
Letter E. F. Johnson to Commissioner General Land Office, February 17, 1869	..	153
Letter E. F. Johnson to Commissioner General Land Office, May 24, 1869	..	153

	Original.	Print.
Stipulation to omit plats or maps, exhibits 1 to 7, inclusive, etc	..	154
Additional statement of facts	..	155
Letter B. F. Wade to Secretary of Interior, November 18, 1871	..	155
Letter Secretary of Interior to Commissioner General Land Office, November 20, 1871	157	157
Stipulation as to use of additional statement of facts on the hearing	158	157
Order, cause heard in part	159	158
Order, cause submitted	160	159
Decree	160	159
Opinion of the court	161	160
Petition for and order allowing appeal	168	166
Assignment of errors	169	167
Citation and admission of service	171	168
Stipulation as to record to be certified to court of appeals	172	169
Clerk's certificate to transcript	174	171
Appearance of counsel for appellant	174	171
Appearance of counsel for appellees	174	171
Order, cause submitted	175	171
Opinion United States circuit court of appeals	176	172
Decree United States circuit court of appeals	195	191
Petition for appeal and order allowing same	195	191
Assignment of errors	197	192
Citation and admission of service	201	194
Clerk's certificate to transcript	203	195

a Pleas and proceedings in the United States circuit court of appeals for the eighth circuit, at the May term, 1899, of said court, begun and held at the United States court-house in the city of St. Paul, Minnesota, on the first Monday in May, to wit, the first day of May, A. D. 1899, before the Honorable Henry C. Caldwell, Honorable Walter H. Sanborn, and Honorable Amos M. Thayer, circuit judges.

Attest:

[SEAL.] JOHN D. JORDAN,
Clerk U. S. Circuit Court of Appeals, Eighth Circuit.

Be it remembered that heretofore, to wit, on the twenty-seventh day of April, A. D. 1899, a transcript of record, pursuant to an appeal allowed by the circuit court of the United States for the district of Minnesota, was filed in the office of the clerk of the United States circuit court of appeals for the eight circuit, in the case of The United States of America, appellant, vs. The Northern Pacific Railroad Company et al., appellees, which said transcript of record is in the words and figures following, to wit:

b UNITED STATES OF AMERICA.

Pleas before the honorable the judges of the circuit court of the United States of America for the district of Minnesota, of the January, A. D. 1899, term of said court, held in the city of St. Paul, in said district, in the year 1899.

UNITED STATES OF AMERICA, COMPLAINANT,
vs.
NORTHERN PACIFIC RAILROAD COMPANY, A CORPORATION, The Northern Pacific Railway Company, a corporation, and Edwin H. McHenry and Frank G. Bigelow as receivers of the Northern Pacific Railroad Company, defendants.

District of Minnesota, ss:

Be it remembered that on the 3rd day of September, A. D. 1897, came the complainant and filed in the clerk's office of this court its bill of complaint, in words and figures following, to wit:

UNITED STATES OF AMERICA,

Complainant.

vs.

NORTHERN PACIFIC RAILROAD COMPANY, a corporation: THE NORTHERN PACIFIC RAILROAD COMPANY, a corporation and EDWIN H. McHENRY and FRANK G. BIGELOW,

Defendants.

INDEX.

Stipulation concerning bill of complaint 1
Order concerning bill of complaint 2
Bill of complaint 3
Exhibit A 11
Exhibit A. 1, Deed dated Jan. 1, 1872 17
Exhibit B 25
Exhibit B. 1 34
Exhibit C 57
Chancery Supoena and Marshal's return of service thereon 64
Appearance of N. P. R. R. and Railway Co 65
Appearance of McHenry & Bigelow, Receivers 66
Disclaimer 67
Order substituting E. G. Hay, Atty 68
Stipulation concerning Replication 68
Replication 69
Stipulation concerning amended answer 70
Stipulation to amend answer 71
Order allowing answer to be amended 73
Joint and several answer 78
Stipulation of Facts 102
Stipulation concerning original exhibits 154
Clerk's certificate 155

In the Circuit Court of the United States,

For the District of Minnesota.

THIRD DIVISION.

THE UNITED STATES OF AMERICA,
Complainant.

vs.

THE NORTHERN PACIFIC RAILROAD COMPANY, a corporation: THE NORTHERN PACIFC RAILROAD COMPANY, a corporation and EDWIN H. McHENRY and FRANK G. BIGELOW,
Defendants.

STIPULATION.

The original bill of complaint in the above entitled case having been several times amended by agreement and stipulation of the parties, it is now deemed best to avoid confusion and for the convenience of all parties that a fair copy of said bill so amended with the amendments placed therein in the regular and proper order, should be filed in lieu of the original bill.

It is therefore hereby stipulated and agreed by and between the complainant above named, by Eugene G. Hay, Esquire, special assistant United States Attorney for the District of Minnesota, its solicitor, and the defendants, the Northern Pacific Railroad Company, Edwin H. McHenry and Frank G. Bigelow as receivers of the Northern Pacific Railroad Company, by C. W. Bunn, Esquire and James B. Kerr, Esquire, their solicitors, that the bill attached hereto is a fair copy of said original bill of complaint and the several amendments thereto heretofore agreed upon, and that the same may be filed as a substitute for and in lieu of said

original bill of complaint now on file in the office of the Clerk of the Circuit Court in and for the Third Division, of the District of Minnesota, and that the exhibits attached to the said original bill of complaint be and constitute the Exhibits to this fair copy according to their respective designation.

EUGENE G. HAY, Solicitor for Complainant.
C. W. BUNN and JAMES B. KERR,
4 Solicitors for Defendants.

Dated this 30th day of July, 1898.

In the United States Circuit Court,

For the District of Minnesota.

THIRD DIVISION.

5

THE UNITED STATES OF AMERICA,
Complainant.

vs.

THE NORTHERN PACIFIC RAILROAD COMPANY, a corporation: THE NORTHERN PACIFIC RAILROAD COMPANY, a corporation and EDWIN H. McHENRY and FRANK G. BIGELOW,
Defendants.

ORDER OF COURT.

6

Upon reading the above and foregoing stipulation, it is HEREBY ORDERED That the fair copy of the bill of complaint in the above entitled action together with the amendments thereto heretofore agreed upon by the parties to said action attached hereto, may be filed as a substitute for and to take the place of the original bill filed in said action, and that the Exhibits attached to and made a

part of said original bill shall be and constitute the Exhibits to said fair copy according to their respective designation.

WM. LOCHREN, Judge.

Dated August 1, 1898.

7

Circuit Court of the United States,

In and for the District of Minnesota.

FIFTH DIVISION.

THE UNITED STATES OF AMERICA,
Complainant.

vs.

THE NORTHERN PACIFIC RAILROAD COMPANY, a corporation: THE NORTHERN PACIFIC RAILWAY COMPANY, a corporation and EDWIN H. McHENRY and FRANK G. BIGELOW, as Receivers of THE NORTHERN PACIFIC RAILROAD COMPANY. 8
Defendants.

IN EQUITY.

TO THE HONORABLE JUDGES OF THE CIRCUIT COURT OF THE DISTRICT OF MINNESOTA, the United States of America, by Joseph McKenna, the Attorney General of the United States, presents 9
this, its bill, against the Northern Pacific Railroad Company a corporation and the Northern Pacific Railway Company, a corporation.

Humbly complaining showeth you orator unto your Honors:

1. That the defendant the Northern Pacific Railroad Company is and was at all the time hereinafter stated a railroad corporation duly created, organized, and existing under a certain act of

Congress entitled "An Act Granting land to aid in the construction of a railroad and telegraph line from Lake Superior to Puget Sound on the Pacific Coast by the northern route" approved July 2nd, 1864 and the Acts amendatory thereof and supplemental thereto, and having its principal place of business in the city of Saint Paul, County of Ramsey, and State of Minnesota.

10 2. The Northern Pacific Railroad Company is a railroad corporation duly organized and existing under the laws of the state of Wisconsin and has duly complied with all the requirements of law of each and every of the states of Wisconsin, Minnesota, North Dakota, Montana, Idaho, Washington and Oregon so as to enable and entitle it to transact business as a railroad corporation and as a common carrier in each and every state above named.

3. That in the year 1893 the defendant the Northern Pacific Railroad Company was insolvent and unable to pay its debts, and in said year certain suits were commenced in the circuit court of the United States for the District of Minnesota alleging the insolvency of said Northern Pacific Railroad Company and the inability of said company to pay its debts.

11

That thereafter such proceedings were duly had therein that Thomas F. Oakes, Henry C. Payne and Henry C. Rouse were by order of said court duly appointed receivers of said court of all and singular the Northern Pacific Railroad Company and all of the property of said company within the jurisdiction of said court. That thereafter said Thomas F. Oakes, Henry C. Payne and Henry C. Rouse duly resigned their said trust as receivers aforesaid and their resignation was duly accepted by said court and thereafter the defendants Edwin H. McHenry and Frank G. Bigelow were by order of said court duly appointed such successors of said Oakes, Payne and Rouse and as receivers of said railroad company as aforesaid, and duly qualified as such receivers and entered upon the discharge of their duties as such receivers.

12

That thereafter such proceedings were duly had in said actions as aforesaid pending in said Circuit Court, that said defendants McHenry and Bigelow were duly appointed by said court final receivers of lands, estates, property and effects remaining, after the disposition of certain thereof not material to the cause of action hereinafter set forth and said McHenry and Bigelow, Receivers as aforesaid, were duly clothed with full power to ad-

minister and adjust said property and maintain and defend all actions at law or suits in equity relative thereto.

That thereafter pursuant to the decree of said court the said Northern Pacific Railroad Company conveyed by deed to said Edwin H. McHenry and Frank G. Bigelow as such Receivers, and for the purpose of their said trust all the property then claimed by the said Northern Pacific Railroad Company situate in the 13
District of Minnesota, among which said property was the land hereinafter described.

4. That said Act of Congress entitled An Act "Granting lands to aid in the construction of a railroad and telegraph line from Lake Superior to Puget Sound on the Pacific Coast by the northern route" approved July 2nd, 1864 provided, among other things:

"And said corporation is hereby authorized and empowered to lay out, locate, construct, furnish, maintain, and enjoy a continuous railroad and telegraph line, with the appurtenances, namely: beginning at a point on Lake Superior, in the State of Minnesota or Wisconsin; thence westerly by the most eligible railroad route, as shall be determined by said company, within the territory of the 14
United States, on a line north of the forty-fifth degree of latitude to some point on Puget's Sound, with a branch, via the valley of the Columbia River, to a point at or near Portland, in the State of Oregon, leaving the main-trunk line at the most suitable place, not more than three hundred miles from its western terminus: and is hereby vested with all the powers, privileges, and immunities necessary to carry into effect the purpose of this Act as herein set forth."

And said Act further provided, that there was thereby granted to the Northern Pacific Railroad Company, its successors and assigns, for the purpose of aiding in the construction of said railroad, every alternate section of public land, not mineral, designated by odd numbers to the amount of twenty alternate sections per mile 15
on each side of said railroad line as said company might adopt, through the territories of the United States, and ten alternate sections per mile on each side of said railroad whenever it should pass through any state, and whenever on the line thereof the United States should have full title at the time the line of said road is definitely fixed and a plat thereof filed in the office of the Commissioner of the General Land Office.

And whenever prior to the definite location any of said sections or parts of sections shall have been granted, reserved, sold, etc., or otherwise disposed of, other lands could be selected by the said company in lieu thereof in alternate sections and designated by odd numbers: not more than ten miles beyond the limits of said alternate sections.

16 Said Section 3 of said Act contains the following provisions and provisos:- Provided, That if said route shall be found upon the line of any other railroad route to aid in the construction of which lands have been heretofore granted by the United States, as far as the routes are upon the same general line, the amount of land heretofore granted shall be deducted from the amount granted by this act.

Provided further, that the railroad company receiving the previous grant of land may assign their interest to said Northern Pacific Railroad Company, or may consolidate, confederate and associate with said company upon the terms named in the first section of this Act.

That Section 8 of said Act provides as follows:

17 Be it further enacted, That each and every grant, right and privilege herein are so made and given to, and accepted by, said Northern Pacific Railroad Company, upon and subject to the following conditions namely: That the said company shall commence the work on said road within two years from the approval of this Act by the President and shall complete not less than 50 miles per year after the second year, and shall construct, equip, furnish and complete the road by the fourth day of July anno Domini eighteen hundred and seventy-six.

That by joint resolution of the Senate and House of Representatives of the United States in Congress assembled, approved May 7th, 1866, it was among other things provided:

"Section 2. And be it further resolved, That the time for
18 commencing and completing the Northern Pacific Railroad Company and all of its several sections is extended for a term of two years."

That by Act of Congress of the United States of May 5th, 1864 entitled "An Act making a grant of land to the State of Minnesota to aid in the construction of a railroad from St. Paul to Lake Superior" the Congress made a grant of land to the State of Minnesota for the purpose of aiding in the construction of a rail-

road in said state from the City of St. Paul to the head of Lake Superior. That by said Act five alternate sections per mile on each side of said railroad on the line thereof within said state was granted to the State of Minnesota for the construction of said railroad. That the Lake Superior and Mississippi Railroad Company became the grantee of the State of Minnesota under said act of Congress and became and was entitled to and did receive all the benefits accuring from said Act of Congress and became and was the 19
grantee of the State of Minnesota to all the lands under said Act of Congress granted to the State of Minnesota in aid of the construction of a railroad from St. Paul to Lake Superior.

That said Lake Superior and Mississippi Railroad Company was a corporation duly created under the laws of the State of Minnesota and did construct a railroad from St. Paul to Lake Superior in the aid of which the grant under said Act of Congress of May 5th, 1864 was made, prior to the filing by the Northern Pacific Railroad Company of any map of definite location as provided in said Act of Congress of July 2nd, 1864, and did receive the benefits of said Act of Congress of May 5th, 1864, in the construction of its road. 20

That the line of road of said Lake Superior and Mississippi Railroad Company extended and was constructed from St. Paul, Minnesota, northeastward to the village of Thomson and thence in a northeasterly direction to the City of Duluth, which said City of Duluth, is situate at a point upon the western shore of Lake Superior.

That on the sixth day of March 1865 the said Northern Pacific Railroad Company filed in the office of the Commissioner of the General Land Office of your orator a plat or map on which was designated the general route of the entire line of its road from Lake Superior to Puget Sound, on which said map or plat, Duluth, on said lake was designated as the Eastern, initial or starting point.

That on the ninth day of July, 1870, a certain agreement was 21
entered into between the said Northern Pacific Railroad Company, The Lake Superior and Mississippi Railroad Company, The Lake Superior and Puget Sound Company, and the Western Land Association, a copy of which said contract is hereto attached and marked Exhibit "A" and made a part hereof, and that the point of junction in said contract named is practically the same as the village of Thomson hereinbefore referred to. That said contract was

ratified, confirmed and accepted by the respective Board of Directors of said companies and all the terms thereof carried out and fulfilled by said respective companies.

That the map of definite location of said Northern Pacific Railroad Company from Thomson to Fargo, Dakota, was filed in the General Land Office December 12th, 1871: and that from Thomson to Duluth, the general line or route of said Northern
22 Pacific Railroad Company was upon the same general line or route of the Lake Superior and Mississippi Railroad.

That on the first day of January, 1872, a certain deed of conveyance of the Lake Superior and Mississippi Railroad Company to the Northern Pacific Railroad Company was duly executed and delivered by the grantor to the grantee therein named and became and was an operative deed of conveyance, a copy of which is hereto attached, and marked Exhibit "A 1" and made a part hereof.

That on the first day of January, A. D. 1872, a certain agreement in writing was made between the Lake Superior and Mississippi Railroad Company and the Northern Pacific Railroad Company, a copy of which said contract is hereto attached and
23 marked Exhibit "B", and made a part hereof; and that all of the provisions of said contract were performed and carried out by the respective parties thereto: and that by said agreement the Northern Pacific Railroad Company did connect its road with Lake Superior at Duluth, in Minnesota from Thomson Junction in said state over a line of railroad to aid in the construction of which lands had been previously granted by the United States.

That on the first day of May, 1872, the said Lake Superior and Mississippi Railroad Company duly made, executed and delivered to the Northern Pacific Railroad Company a certain contract of lease, a copy of which said lease is hereto attached, marked Exhibit "B1" and made a part hereof, which said lease was accepted by said Northern Pacific Railroad and the terms thereof complied
24 with by the parties thereto and said railroads were thereafter operated according to the terms of said contract of lease.

That on the ninth day of August, 1876, a certain other written contract was made between the Northern Pacific Railroad Company and the Lake Superior and Mississippi Railroad Company and other persons under and by virtue of the terms of which all of the rights theretofore granted by the deed of conveyance of January 1st, 1872, were expressly confirmed in said Northern Pacific

Railroad Company, a copy of which said contract is hereto attached and marked Exhibit "C" and made a part thereof.

That said Northern Pacific Railroad Company operated its said railroad from Lake Superior to Thomson Junction under the said agreement and contract of purchase and westward from Thomson toward the western terminus of said road for more than ten years thereafter and did expend large sums of money in the construction of its said road to the City of Duluth and in the construction of docks, railroad buildings, wharfs and structures of a like nature at the City of Duluth. And use and operate the line of said road from Thomson to Duluth in all respects as its main line of road from Lake Superior to Puget Sound and in all respects as that part of the road from Thomson westward to Puget Sound, and ever since has occupied and now does so occupy and use the same. 25

4½. That on the fifth day of May, 1864, the Congress of the United States passed an act entitled "An Act granting lands to aid in the construction of certain railroads in the State of Wisconsin," by the third section of which it is provided as follows:

Section 3. And Be It Further Enacted, That there be, and is hereby, granted to the State of Wisconsin, for the purpose of aiding in the construction of a railroad from Portage City, Berlin, Doty's Island or Fon Du Lac, as said state may determine, in a northwestern direction to Bayfield, and thence to Superior, on Lake Superior, every alternate section of public land, designated by odd numbers, for ten sections in width on each side of said road, upon the same terms and conditions as are contained in the act granting lands to said state to aid in the construction of railroads in said state, approved June three, eighteen hundred and fifty-six. 26

That thereafter the State of Wisconsin duly conferred said grant of land upon the Portage, Winnebago and Superior Railroad Company, and said company did, on the tenth day of November, 1869, file in the Land Department of the United States their map showing the definite location of their line or road as prescribed in the act of Congress herein referred to, which said map shows said line of definite location to be along and near the south shore of Lake Superior from Bayfield in the State of Wisconsin to Superior in the State of Wisconsin, which said map of definite location was duly accepted by the Land Department of the United States and the lands within the limits of the grant as shown by said map were duly withdrawn from settlement and entry. 27

5. That the said City of Duluth, in the County of St. Louis and State of Minnesota became and was, and now is the eastern terminus or eastern initial point of the grant to the said Northern Pacific Railroad Company, which said grant was by the said Act of Congress of July 2nd, 1864, and the said eastern terminus, or eastern initial point of said line of road has not been elsewhere than at the said City of Duluth, and State of Minnesota. That lot 5 of
28 Section twenty-nine (29) Township fifty-four (54) north of Range Thirteen (13) west, in the County of St. Louis, and State of Minnesota was prior to the 22nd day of April, 1895, a part of the public domain of the said United States and is situate, lying and being more than ten miles east of the aforesaid eastern terminus or eastern initial point of the grant made by the said Act of Congress of July 2nd, 1864, and is more than ten miles distant from any line, part or portion of said railroad from the said city of Duluth, westward to the Pacific Coast and is without the limits of the grant to said Northern Pacific Railroad Company under the said Act of July 2nd, 1864, and any and all Acts amendatory thereof and supplementary thereto, and is not co-terminus with said road so
29 located from the initial point or eastern terminus at Duluth westward to Puget Sound.

6. That on the 22nd day of April A. D. 1895 the ministerial officers of your orators in derogation of the rights of your orator and through inadvertance and mistake conveyed by patent the above described land to the Northern Pacific Railroad Company under the erroneous impression and mistaken belief that said tract of land was lying and being within the limits of the aforesaid grant to said Northern Pacific Railroad Company: that the said defendants have expressly waived a demand for re-conveyance of said land as provided by Act of Congress.

7. That the Northern Pacific Railroad Company claims some interest in, lien upon and title to the land hereinbefore described adverse to the title and interest of the plaintiff herein.

30 8. That said action is commenced against Edwin H. McHenry and Frank G. Bigelow, as receivers of the Northern Pacific Railroad Company, by leave of the Circuit Court in and for the Eastern District of Wisconsin first had and obtained.

WHEREFORE YOUR ORATOR PRAYS for a decree herein against the said defendants, the Northern Pacific Railroad Company, the Northern Pacific Railway Company, Edwin H. McHenry and Frank G. Bigelow, as receivers of the Northern Pac

ific Railroad Company, and each of them, that the said tract of land hereinbefore described be restored to your orator and that said defendants be required to reconvey all of said tract of land hereinbefore described to your orator and that said patent as aforesaid issued by the ministerial officers of your orator on the 22nd day of April 1895, so far as the tract of land hereinabove described is concerned be cancelled and annuled, and for such other and further relief as may be just and equitable. 31

And may it please your honors to grant unto your orator a writ of Subpoena issued out of and under the seal of this court directed to the defendants, the Northern Pacific Railroad Company, the Northern Pacific Railway Company, Edwin H. McHenry and Frank G. Bigelow, commanding them at a day certain and under certain penalties therein to be specified, personally to be and appear before your honors, in this honorable court and then and there to answer (but not under oath) all and singular the premises, and to stand to, perform and abide such order and decree as to your honors shall seem meet. And your orator will ever pray.

(Signed) JOSEPH MCKENNA,
Attorney General. 32

E. C. STRINGER,
United States Attorney for the
District of Minnesota.

(Endorsed) Copy of Bill of Complaint and amendments.
Filed Aug. 2nd, 1898.
HENRY D. LANG, Clerk.
By LOUISE B. TROTT, Deputy.

EXHIBIT "A".

Quadripartite Contract. 33

between

The Northern Pacific Railroad Company,
The Lake Superior and Mississippi Railroad,
The Lake Superior and Puget Sound Company
and the
Western Land Association.

WHEREAS, in a certain supplemental agreement between the Northern Pacific Railroad Company and Jay Cooke and Co., dated January 1st, 1870, certain covenants were made which by reference to the same will appear at length and

WHEREAS, the Western Land Association is desirous of complying with the terms of said agreement, and is also desirous
34 of securing for its property at Duluth and Thomson the advantages that must result from the building and operating the said railroad and

WHEREAS, the Northern Pacific Railroad Company desires to obtain certain right of way and depot and other grounds, the property of the Western Land Association and

WHEREAS, the Lake Superior and Puget Sound Company is desirous of securing certain stock of the Western Land Association and

WHEREAS, the Lake Superior and Mississippi Railroad Company is desirous of securing upon equitable terms the advantages of the trade of the Northern Pacific Railroad Company over their line from Thomson to Duluth—therefore, this agreement of four
35 parts:

1. It is agreed that the Northern Pacific Railroad Company shall so connect their road with the road of the Lake Superior and Mississippi Railroad Company at or near the Dallas of the St. Louis River as to open direct communication by rail with the town of Duluth and thus maintain such connection as to enable that town to be one of its principal points of trade, and trans-shipment on Lake Superior and shall enter into running arrangements with the Lake Superior and Mississippi Railroad Company on terms that shall be just and equitable to accomplish that object, and said Northern Pacific Railroad Company shall make their first connection east from their point of intersection with the Lake Superior and Mississippi Railroad Co. by way of the line of the said last mentioned company over Rices or Minnesota Point, and that it
36 will not build any other road so as to form a connection running eastward of the Lake Superior and Miss. Railroad north of Wyoming previous to the completion of its road to the Missouri River.

2. The Western Land Association agrees to double its stock making a total of four thousand shares, two thousand shares of which is to be delivered to the Lake Superior and Puget Sound Co. when a contract is made and executed between the North-

ern Pacific Railroad Co. and the Lake Superior and Miss. Railroad Co. for running over their line as herein provided, and a contract entered into with the Western Land Association to carry out the provisions of this agreement and upon the payment of One Hundred and Twenty Thousand Dollars cash by the Lake Superior and Puget Sound Company, made as hereinafter, provided, Twenty Thousand Dollars of which shall be 37
divided equally between the two thousand shares belonging to the original shareholders, and the two thousand shares belonging to Lake Superior and Puget Sound Co. and one hundred thousand dollars shall be deposited in the treasury of the Western Land Association to be invested as may be directed by the Board, also it will at the same time execute by good and valid conveyances title to such lands as it controls at or near the junction of the Northern Pacific Railroad and the Lake Superior and Miss. Railroad near the Dalles of the St. Louis River, as may be sufficient for shops, depots, stations and similar buildings used for railroad purposes free of all charge, said lands to be settled for these purposes by the engineers, or authorized officer of the two roads; and will give free of charge right of way over any lands it controls 38
at Duluth or Minnesota or Rices Point or between Duluth and the Mississippi River on the line of the Northern Pacific Railroad westward, and also that the Board of Directors of the Western Land Association shall be increased by the addition of two members to be named by the Lake Superior and Puget Sound Company.

The Western Land Association further agrees to furnish a schedule of its real estate and other assets to the Lake Superior and Puget Sound Company.

3. The Lake Superior & Puget Sound Co. will pay to the Western Land Association, one hundred and twenty thousand dollars cash for the above recited two thousand shares of stock upon their issue and delivery as above, said stock thereupon to be divided among the several stockholders of the Lake Superior and Puget Sound Co. in proportion to their respective interests. 39

4. The Lake Superior and Mississippi Railroad Co. agree to give free of charge to the Northern Pacific Railroad Co. such lands as the Chief Engineer of both parties may deem sufficient for its depot purposes from the lands that they possess at Duluth unappropriated for their own terminal facilities, excepting the land northeastward of the breakwater (it being understood that their unappropriated land is sufficient for the aforesaid purposes) and

also the right to way over any of their lands for the extension of their road eastward over Minnesota or Rices point also so much of their lands west of the Dalles as are found necessary by said engineers for right of way for their main tract, depot purposes, shops and sidings.

It being agreed that proper arrangements shall be made between the Lake Superior and Mississippi Railroad Company and
40 the Northern Pacific Railroad Company for the use of the road of the party first named from the Dalles to or through Duluth, or for the sale of a part thereof sufficient for one or more tracks when the same may become necessary for the business of the Northern Pacific Railroad Company.

5. Whatever donations have been or may be made of property with the objection of securing the location of the Northern Pacific Railroad to or through Duluth or are covered by the agreement of December 29th 1869, shall accrue to the Western Land Association as hereby enlarged.

6. These resolutions to be accepted by the Board of Directors of the four companies in the preamble named and proper pa-
41 pers to secure all the within covenants to be simultaneously executed.

7. Questions that may arise as to the true intent and meaning of the agreement will be referred to arbitrators in the usual manner one of which shall be chosen by the Northern Pacific Railroad Company and Lake Superior and Puget Sound Company and one by the Lake Superior and Mississippi Railroad Company and the Western Land Association and if they fail to agree, a third to be chosen by the two, and a decision of a majority shall be final and binding on all the parties.

IN WITNESS WHEREOF all the parties have hereunto set their hands and corporate seal at the City of New York this ninth day of July A. D. 1870.

42 (Seal of the N. P. R. R. Co.)

The Northern Pacific Railroad Company.
By (Signed) J. GREGORY SMITH, President.
" " SAML. WILKINSON, Secretary.
Lake Superior & Puget Sound Company.
By (Signed) THOS. H. CANFIELD, President.
" " SAML. WILKINSON, Secretary.

(Seal of the W. L. A.)

(Signed) S. M. FELTON, President, W. L. A.
" WALTER HINCHMAN, Secretary.
W. L. A. of M.

(Seal of the L. S. M. R. R. Co.)

(Signed) S. M. FELTON, Executive Committee
" ISAAC HINCKLEY, L. S. & M. R. R.

Attest. 43

Signed, ROBERT H. LAMBORN, Sec'y.

WESTERN LAND ASSOCIATION OF MINNESOTA.

Location.	No. of Acres.	Size of Lots.	Average No. of Lots per Acre.
Forest Lake,	157.20	50x150	3
Wyoming,	60.	"	3 5-6
North Branch,	400.	"	3
Rush City,	520.	"	3
Pine City,	667.93	"	3 1-2
Hinckley,	2060.89	"	4 1-20
Thomson, (Dalles)	1697.66	Survey in progress.	
Duluth proper,	1953.36	50x140	
Upper Duluth,		40x100	
Lower Duluth,		"	
Portland,		30x120	
Oneota,		50x132	
Rices Point,		25x120	

44

Total 7517.04 acres.

From which deduct for R. R. Purposes say 210 acres.

EXPENDITURES.

45

Paid for 7517.04 acres of land	-	$106,874.13
Expended at Duluth office for clearing town Surveys, Gradings, Taxes, Interest, Salaries and Expenses	-	20,348.41
Expended at Philada Office since organization for Office Expenses, Rents, Salaries, Incidentals, Legal and Trav-		

eling Expenses, etc., etc., including 470 shares G. W. M. Co. Stock		-	9,851.60
			$137,074.14
Interest - - - -			15,000.00
			$152,074.14
46 Apr. 1, 1870, Due on Credit Sale with interest at 10 per cent till paid		$26,144.17	
Cash in hand of Agents		2,714.27	
" Treasurer		6,995.87	35,824.31
Total Expenses and Assets -		-	$187,989.45

In addition to the 7517 acres already paid for the W. L. A. has right to purchase 83 acres at Fond Du Lac at $5.00 per acre, and as much land as is desirable for town sites at Moose Lake and Kettle River at $5.00 per acre.

I, George W. Board, Secretary of the Northern Pacific Railroad Company do hereby certify that the foregoing contract
47 between the following parties, to-wit:

The Northern Pacific Railroad Company,
The Lake Superior and Mississippi Railroad,
The Lake Superior and Puget Sound Company,

and the

Western Land Association,

Is a true and correct copy compared by me of the original of said contract and the whole thereof, and that the same is taken from the record books of the Northern Pacific Railroad Company; and the same was executed at or about the date thereof.

WITNESS MY HAND and the seal of said Northern Pacific Railroad Company the 30th day of April, 1896.

GEORGE W. BOARD,
48 [SEAL.] Secretary.

EXHIBIT "A 1."

Lake Superior and Mississippi Railroad Company

To

Northern Pacific Railroad Company.

DEED.

Sale of one-half of road, etc., from near Town of Thomson to center of Lake Avenue, Duluth.

Dated January 1, 1872.

49

THIS INDENTURE, made the first day of January, in the year one thousand, eight hundred and seventy-two, between The Lake Superior and Mississippi Railroad Company, a corporation created by and existing under the laws of the State of Minnesota, party of the first part, and The Northern Pacific Railroad Company, a corporation created by an Act of Congress of the United States of America, entitled "An Act granting lands to aid in the construction of a railroad and telegraph line from Lake Superior to Puget Sound on the Pacific coast by the Northern route," approved July 2nd, 1864, and existing under said act and certain resolutions amendatory thereof, as well as under certain legislative acts of the states of Minnesota and Wisconsin, respectively, party of the second part.

50

WHEREAS, the said party of the first part is the owner of a certain line of railroad known as the Lake Superior and Mississippi Railroad, which extends from the City of St. Paul, in the State of Minnesota, to the City of Duluth, in the same state, and which, entering the City of Duluth, runs to a grain elevator erected upon a dock on the margin of the waters of Lake Superior, including a passenger and freight depot and numerous side-tracks within said city.

AND WHEREAS, the said party of the second part is duly authorized by law to construct, or to acquire, and to maintain and operate a certain railroad which, if constructed as an independent line, would run into and through Duluth aforesaid, and to the waters of Lake Superior, aforesaid, and terminate at a point adjacent to the terminus of said Lake Superior and Mississippi Railroad.

51

AND WHEREAS, the railroad of said party of the second part, commonly known as the Northern Pacific Railroad as the same is now located and constructed, connects with the said Lake Superior and Mississippi Railroad near the town of Thomson, in Carlton County, in the said State of Minnesota, but has not been constructed into the said City of Duluth, and the said party of the

second part has heretofore by agreement with said party of the first part, done its transportation between the said point of connection of said roads and the water of Lake Superior over and by the way of the said Lake Superior and Mississippi Railroad.

And Whereas, the said party of the second part, being desirous of permanently securing the right to use the portion of
52 said railroad which extends from the said point of connection of said roads into Duluth as aforesaid, to the end that the necessity for the construction of the said Northern Pacific Railroad from the said point of connection to the said City of Duluth may be obviated, has agreed to purchase an undivided one-half interest in such portion of the said Lake Superior and Mississippi Railroad for the price or sum of five hundred thousand dollars in gold, payable, with interest, at the time and in the manner hereinafter set forth, and the said party of the first part has agreed to sell and convey the same to the said party of the second part, and to grant certain easements and rights of way over and in connection therewith.

And Whereas, the said party of the first part heretofore exe-
53 cuted and delivered to J. Edgar Thomson and William G. Moorhead, both of the City of Philadelphia, in the state of Pennsylvania, two several deeds of trust or mortgage of and upon all its railroad and other property, and the land grants connected therewith, to-wit: A deed of trust or mortgage, bearing date on the first day of January, one thousand, eight hundred and sixty-nine, made to secure the payment of certain bonds of the said party of the first part, known as the First Mortgage Seven per cent, Land Grant Bonds of the said party of the first part; which bonds amount in the aggregate to four million, five hundred thousand dollars, and are payable on the first day of January, one thousand, eight hundred and ninty-six, in gold coin of the United States of America, free of United States taxation, and bear interest payable semi-anually in the like gold coin, and also free of United States taxation; and a certain other
54 deed of trust or mortgage, bearing date on the first day of April, one thousand eight hundred and seventy, made to secure the payment of certain other bonds of the said party of the first part, known as the Second Mortgage Seven Per Cent Land Grant Bonds thereof, which Second Mortgage Bonds amount in the aggregate to three million, two hundred thousand dollars and are payable on the first day of October, one thousand nine hundred,

in gold coin, of the United States of America, free of United States taxation, and bear interest, payable semi-annually, in like gold coin, and in like manner free of taxation.

And Whereas, both of the said deeds of trust or mortgages are liens upon the railroad and premises, the use whereof the said party of the second part is desirous permanently to secure and in and to which the said party of the first part has agreed to sell and convey to the said party of the second part an equal undivided interest as aforesaid, so that, at the date hereof, the said party of the first part is unable to grant and convey to the said party of the second part, a good title to the said railroad and premises, free from all incumbrances. 55

Now, Therefore, This Indenture Witnesseth, that the said party of the first part, for and in consideration of the sum of one dollar to the said party of the second part duly paid, at or before the ensealing and delivery of these presents, the receipt whereof is hereby acknowledged, and for and in consideration of the covenants and agreement of the said party of the second part to pay to the said party of the first part the further sum of five hundred thousand dollars, in gold coin of the United States of America, at the time and in the manner hereinafter mentioned and set forth, together with semi-annual interest thereon, the said party of the first part has bargained and sold and by these presents doth bargain, sell, convey, assign, transfer and set over, unto the said party of the second part: All the equal undivided one-half part of all and singular that part or portion of the railroad belonging to the said party of the first part, and known as the Lake Superior and Mississippi Railroad, which extends from the point of connection thereof with the Northern Pacific Railroad aforesaid, near the town of Thomson, in Carlton County, in the State of Minnesota aforesaid, to a point within the said City of Duluth where the said railroad intersects the center line of Lake Avenue, in said city, being a distance of twenty-six miles, more or less, including the roadbed of such hereby granted portion of said railroad, and the superstructure and tracks thereon, and the tracks, bridges, viaducts, culverts, fences and other structures, and all lands, buildings, and premises used or held for use for depot or station purposes in connection with such portion of said railroad, including the passenger depot within the said City of Duluth, excepting, however, from the premises hereby granted, the lots numbered 2, 56 57

3, 4, 5, 6, and 7 in block "E" the lots numbered 1, 2, 3, and 4 in block "F" the lots numbered 1, 2, 3 and 4 in block "H" on Rice's Point in the said City of Duluth as such lots are laid down on a certain map of the said City of Duluth entitled "Map of Duluth, St. Louis Co., Minnesota," made by C. G. Franklin, C. E., of said city; which excepted premises embrace the round-house and turn-
58 table with the movable tracks connected therewith, and the machine shops and works and the engine house and engine house tracks belonging to the said party of the first part, which are situate upon Rice's Point, aforesaid.

And This Indenture Further Witnesseth, that for the consideration aforesaid, the said party of the first part has given, granted and confirmed, and by these presents doth give, grant and confirm unto the said party of the second part, the right and privilege to lay down suitable and proper railroad side tracks and switches over and upon the unoccupied portions of said excepted lots, and to use the same so far and to the full extent that may be necessary to give the said party of the second part free ingress and egress for its traffic to the docks and property of the said party of
59 the second part upon said lake.

And This Indenture Also Witnesseth, that the said party of the first part has given, granted and confirmed, and by these presents doth give, grant and confirm unto the said party of the second part, the right, privilege and easement to run any and all grain trains, carrying traffic for the said party of the second part to and from the grain elevator on Minnesota Point, in Duluth aforesaid, so that the said party of the second part may have equally with the said party of the first part the use of the tracks, laid and to be laid, of the said Lake Superior and Mississippi Railroad, which extend from the center line of Lake Avenue aforesaid to the grain elevator aforesaid for the purpose of delivering and receiving grain, but for no other purpose.

And This Indenture Further Witnesseth, That the said
60 party of the first part has also given, granted and confirmed, and by these presents doth give, grant and confirm unto the said party of the second part, the further right and privilege of laying down over and upon so much of the land acquired or appropriated by the said railroad as lies between the center line of Lake Avenue aforesaid and the eastern shore of Minnesota Point aforesaid, and as constitutes a strip of land sixty feet in width, and bounded

southerly by the southerly boundary line of the land so acquired or appropriated for such right of way; together with the right, privilege and easement of running trains over said tracks so to be laid down; but such right to use the tracks so laid down shall be common to both parties, so far as their respective traffic shall require.

PROVIDED, HOWEVER, and these presents and all the grants, rights and privileges therein mentioned are made and given upon 61
the express condition, that the said party of the second part being suffered and permitted to remain in the quiet and peaceful enjoyment of the same shall and does, semi-annually, to-wit: on or before the first day of July, 1872, and semi-annually thereafter in each and every year, pay over to the said party of the first part the sum of seventeen thousand five hundred dollars in the gold coin of the United States of America, and in addition thereto such further sum as shall be equivalent to the United States taxes on seventeen thousand five hundred dollars of the interest on the bonds first aforesaid; and *provided further*, that when the said bonds become due and payable the said party of the second part shall and does pay over to the said party of the first part, the just 62
and true sum of five hundred thousand dollars in the gold coin aforesaid upon the lands and premises hereinbefore granted, being discharged from the said liens and from all other incumbrances theretofore created or suffered by the said party of the first part; *Provided, however*, that the said party of the second part shall be entitled at any time at its own option to make payment of said sum of five thousand dollars, although said bonds may not yet have become due;

AND PROVIDED FURTHER, that upon payment of the said principal sum of five hundred thousand dollars in gold to the said party of the first part, whether at or before the maturity of said bonds, with all interest accrued thereon, the said party of the second part shall become vested with the title to the premises hereinbefore granted free and forever discharged from the con- 63
ditions hereinbefore set forth.

TO HAVE AND TO HOLD, all and singular the lands and premises and the rights, privileges and easements hereinbefore granted unto the said party of the second part, its successors and assigns, forever, unless the said party of the second part shall make default in the observance and performance of the agreements on its part hereinbefore set forth.

AND, the said party of the first part hereby covenants, promises and agrees to and with the said party of the second part, that the said party of the first part is seized in fee simple of and is well entitled to grant and convey the lands and premises hereinbefore granted and conveyed subject only to the deeds of trust or mortgage aforesaid; and that the said party of the second part shall and
64 may as a tenant in common with the said party of the first part peaceably and quietly have, hold and enjoy the same, and that the said party of the first part shall and will at any and all times hereafter, and as often as thereunto requested by the said party of the second part, execute, acknowledge and deliver any and all such further and other deeds and assurances in the law for the conveyance of the equal undivided interest aforesaid in the premises hereinbefore described and for the granting and confirming of the easements and privileges aforesaid, subject to the payment of the purchase money aforesaid and the interest thereon, as by the said party of the second part, or by its counsel learned in the law, shall be reasonably advised, devised or required.

IN WITNESS WHEREOF, the said parties of the first and sec-
65 ond parts have caused their respective common and corporate seals to be hereunto affixed and these presents to be signed by their respective presidents and secretaries the day and year first above written.

[Corporate Seal.]

FRANK H. CLARK,
President of the Lake Superior and Mississippi R. R. Co.

S. W. COLTON, JR.
Asst. Secretary of the Lake Superior and Miss. R. R. Co.

Signed, sealed and delivered in behalf of the Lake Superior and Mississippi Railroad Company in the presence of

JAMES SMITH, JR.,
66 J. H. DINGE, JR.

[Corporate Seal.]

J. GREGORY SMITH,
President Nor. Pacific Railroad Co.

SAM'L WILKESON,
Secretary of the Northern Pacific Railroad Company.

Signed, sealed and delivered in behalf of the Northern Pacific Railroad Company, in the presence of

J. P. SINNOT and
CHARLES NETTLETON.

STATE OF NEW YORK, }
City and County of New York. } ss.

Be it remembered that on this 12th day of January A. D. 1872, 67
before me, the undersigned Charles Nettleton, a commissioner, resident in the City of New York, duly commissioned and qualified by the executive authority and under the laws of the State of Minnesota, to take the acknowledgment of deeds, etc., to be used or recorded therein, personally appeared J. Gregory Smith, the president of the Northern Pacific Railroad Company and Samuel Wilkeson, the secretary of the same company, to me personally known to be such and being by me duly sworn, did depose and say, that he, the said J. Gregory Smith, resided in Saint Albans, in the State of Vermont, and that he the said Samuel Wilkeson, resided in Suffolk County, State of New York, and that he the said J. Gregory Smith was the president of said company, that he the said Samuel Wilkeson was the secretary of the same company, 68
that they knew the corporate seal of said company that the seal affixed to the foregoing instrument is such corporate seal, that it was so affixed thereto by order of the Board of Directors of said company, and that they severally signed their names thereto by the like order as president and secretary of the said company respectively. And the said J. Gregory Smith and Samuel Wilkeson also severally acknowledged that they executed the said instrument as their free and voluntary act and deed, and the free and voluntary act and deed of the said Northern Pacific Railroad Company for the uses and purpose therein mentioned.

IN WITNESS WHEREOF I hereunto set my hand and affix my official seal.

CHARLES NETTLETON,
Commissioner for Minnesota in New York, 69
[Seal.] 117 Broadway, N. Y. City.

STATE OF PENNSYLVANIA. }
City and County of Philada. } ss.

Be it remembered that on the seventeenth day of January, A. D. 1872, before me the undersigned J. Paul Diver, commissioner

resident in the City of Philadelphia, duly commissioned and qualified by the executive authority and under the laws of the State of Minnesota to take acknowledgments of deeds, etc., to be used or recorded therein, personally appeared Frank H. Clark, the president of the Lake Superior and Mississippi Railroad Company and S. W. Colton, Jr., the assistant secretary of the same company, personally known to me to be such and being by me duly sworn, did
70 depose and say that he, the said Frank H. Clark resided in the City of Saint Paul, State of Minnesota, that he, the said S. W. Colton, Jr., resided in the City of Philadelphia, State of Penna., that he the said Frank H. Clark was the president of said company, and that he, the said S. W. Colton, Jr., was the assistant secretary of the said company, that they knew the corporate seal of said company, that the seal affixed to the foregoing instrument is the corporate seal, that it was so affixed thereto by the order of the board of directors of said company and that they severally signed their names thereto by the like order as president and assistant secretary of the said company respectively, and the said Frank H. Clark and S. W. Colton, Jr., also severally acknowledged that they executed
71 the said instrument as their free act and voluntary deed, and the free and voluntary act and deed of the said Lake Superior and Mississippi Railroad for the uses and purposes therein mentioned.

IN WITNESS WHEREOF I have hereunto set my hand and affixed my official seal as such commissioner.

J. PAUL DIVER,
Commissioner of Deeds, etc., for the
[Seal.] State of Minnesota.

Filed for record in the office of the register of deeds in the County of St. Louis, on the twenty-sixth day of February, 1872, and recorded in Book "H" of deeds, pages 226 to 232 inclusive.

72

Exhibit "B".

Lake Superior and Mississippi Railroad Company
with
Northern Pacific Railroad Company.

Agreement for operating joint roads, etc., from near Thomson to center of Lake avenue, Duluth. 73

January 1, 1872.

This Agreement; made the first day of January in the year one thousand eight hundred and seventy-two, between the Lake Superior and Mississippi Railroad Company, a corporation existing in the State of Minnesota, party of the first part, and The Northern Pacific Railroad Company, party of the second part.

Witnesseth, that the said party of the first part has sold to the said party of the second part an equal undivided interest in and to the right to jointly use and operate that portion of its main line 74
of railroad from and between the junction of the railroads of said several companies near Thomson, in Carlton county, in the State of Minnesota, and a point where the center line of Lake avenue in the City of Duluth in said state, crosses the main track of said party of the first part as now located and constructed or as it may be hereafter located and constructed, with certain other rights, property and privileges more particularly described and set forth in a deed of even date herewith executed by said first party, to be simultaneously herewith delivered to said second party. The said second party hereby agrees to pay said first party for, and on account of said purchase, the sum of five hundred thousand dollars ($500,000.00) in gold coin, to be paid on the first day of January in the year One Thousand Eight Hundred and Ninety-six, if the
75
premises shall at that date shall be unincumbered of certain mortgages in said deed mentioned and described, or as soon thereafter as said premises shall be so unincumbered: and while suffered to remain in possession of said premises, and until said principal sum shall become due, to pay semi-annually as interest thereon, on the first days of January and July of each year, the sum of seventeen thousand five hundred dollars ($17,500.00) in gold, to be applied

in paying the semi-annual interest upon maturing coupons of the mortgage bonds of said first party so as to pay and satisfy interest coupons upon said bonds to the amount of such semi-annual payments, and of United States taxes thereon the first of said semi-annual payments of seventeen thousand five hundred dollars, to become due and payable on the first day of July, one thousand eight hundred and seventy-two: And further in consideration of the
76 premises aforesaid, and of the mutual covenants and agreements between said several parties hereinafter set forth, it is further agreed by and between the parties hereto as follows:

FIRST:—That in all matters appertaining to the use of said section of railroad and its appurtenances, thus to be used in common as aforesaid by the parties hereto, the said parties, their successors and assigns, shall conform to such rules and regulations as shall from time to time be established by the general superintendents for the time being of the said parties respectively. That a time schedule with a table of rules and regulations for the operating of trains and the management of said section of railroad shall be agreed upon and established by the said superintendents as soon after the
77 date hereof as may be practicable and shall take effect immediately, and that no change except as hereinafter provided shall subsequently be made in the said time schedule, or table of rules and regulations without the consent of both the said superintendents.

PROVIDED HOWEVER, that if the said superintendents shall not agree to the rules and regulations to be established and take effect after the first day of January, one thousand eight hundred and seventy-two aforesaid, or if either of the said superintendents shall propose any alteration of the said rules and regulations after the same shall have been adopted or established, and the other superintendent shall not agree thereto, then the superintendent hereinafter specially provided to be appointed for said section shall finally decide all questions in dispute, and the said table of rules and regulations shall be made to conform to the decision of the said special super-
78 intendent, and a copy of the said table certified to by the signature of the said special superintendent shall be conclusive evidence of the existence and obligations of the rules and regulations therein contained.

SECOND:—That the management and control of the said section of railroad and its appurtenances, and of the movement of all trains, cars and engines on the said sections, shall be entrusted to a

superintendent who shall act in common for both parties, whose appointment shall be confirmed by the board of directors of each of the respective parties above named: or they failing to agree, an appointment shall be made by referees as hereinafter provided: and all switchmen, trackmen, signalmen, passenger station keepers water station keepers and other agents (except trainmen for regular trains) required for the care, maintenance and operation of the said section of road and its appurtenances, shall be appointed by the said superintendent, and shall be under his control absolutely, and all trainmen of either of the respective parties while on this section of railroad on duty on train or otherwise should be absolutely under the control of the said superintendent of this section of road, who shall have the power to discharge them in case of insubordination, or for the violation of any train order or rule or regulation made to govern the movement of trains on said section: and said employees or trainmen shall have no power to appeal to either general superintendent of the respective parties above named, to be restored to any position on the above named section: and in case of the discharge of any trainmen or employee as above mentioned by the said superintendent, it shall be his duty to inform the general superintendent under whom such employee or trainman held his position, of the cause of such discharge in writing, without delay. 79 80

And it is Further Mutually Agreed and Understood, that if either of the respective parties through their general superintendent or other duly authorized agent or officer, object at any time to the retention of the superintendent of said section of road, then the general superintendent of each of the respective parties shall, (if after a consultation they agree) submit in writing to his board of directors through the president of the same, the reason why such removal is demanded, and each of the respective boards of directors will, within thirty days after receiving such notice in writing, if they fail to agree amicably between themselves, appoint a competent referee and they to choose a third one, the three referees will, within thirty days after their appointment proceed to examine into the complaint, and determine whether the objection is or is not well founded in fact, and otherwise sufficient, and the decision of all or a majority of the referees shall be final and conclusive and forthwith acted upon accordingly by the respective boards of directors. In case the general superintendent of the respective parties cannot agree, or either of the board of directors fail or neg- 81

lect to appoint a referee for more than twenty days after having received written notice from the other party of the objections made, and of the name and residence of the referee appointed by the other party, then the referee thus appointed shall choose another, and these two shall choose a third, and a decision of the three, or a majority of them, shall be absolutely binding, final and conclusive as aforesaid. In case the objections are sustained, said referees
82 shall have the power to remedy the grievance complained of, and to order the said superintendent to take such action as may be necessary for the purpose, or to remove the said superintendent and appoint another to fill the position made vacant by the joint action of the respective boards, and they failing to agree, the said appointment shall be made by the said referees as hereinbefore provided for.

THIRD:—That it shall be the duty of the said superintendent to keep the section of railroad and its appurtenances in good order and condition, to employ the proper force of station keepers, trackmen, switchmen, signalmen, laborers and such other agents or servants as are usually employed on the line of a railroad, and to
83 provide from time to time such additional switches, turnouts, sidings, passenger stations, water stations and other appurtenances as may be absolutely required to accomodate the business and for the joint use of both parties on said section of road, said party of the second part first putting in twenty-one hundred and thirty (2,130) feet of tracks in sidings, and four (4) frogs and switches at its own expense as that is the amount constructed by the Lake Superior and Mississippi Railroad Company since the first day of January one thousand eight hundred and seventy-one, and all expenses thus incurred, including therein all salaries and wages paid for the superintendence and maintenance, care, renewal and repairs of the said section of railroad and appurtenances, and including also all and every expense whatever, whether hereinbefore specially defined or not, which shall be properly chargeable to the
84 maintenance of way, repairs or renewals of the said section of railroad and its appurtenances shall be equally borne between the said parties, either party to be at liberty to advance the money required to defray such expenses, and the account between them to be adjusted monthly, and settled at least semi-annually, interest at the legal rate to be charged on all advances.

FOURTH:—That all tax charges and assessments of any and every kind shall be assessed upon the section of road and appurtenances thus as aforesaid to be used in common by the parties hereto, shall be equally divided between the said parties, but nothing herein contained shall be construed as requiring either party to pay any portion of any tax charge or assessment which may be imposed or levied on the business of the other over the said section of road. 85

FIFTH:—That neither party shall be responsible to the other for any loss or damage resulting from any defect in the roadway thus as aforesaid to be used in common, or any switch or other device appurtenant thereto, or for any negligence or misconduct of any agent, officer or servant employed at the joint expense of the parties hereto in or about the said section of railroad and its appurtenances. AND IT IS FURTHER MUTUALLY UNDERSTOOD AND AGREED, that should any accident happen to the train or property of either party on this section of railroad through the neglect or negligence of the employees of the other party, then the party whose employees have caused such damage shall be responsible to the other party to the full amount of damages sustained by reason 86 of such accident, and shall pay for the same in full.

SIXTH:—That each of the respective parties shall have the right to run all the regular trains as per its time card, and all irregular, extra or wild trains over said section of railroad, that they deem necessary, from time to time, for the accomodation of their business, subject only to the rules and regulations that may be made from time to time, by the mutual agreement of both parties to govern and control the movement of trains over said section of said railroad, or in default of such agreement by the said sectional superintendent, trains of the same class of each party having the same rights over the said section of road, and the superintendent of said section of road shall receive all trains of both parties whether regular or irregular, extra or wild trains and forward them over said section of railroad with all reasonable dispatch, faithfully and 87 impartially, giving and according to all trains of both parties the same and equal rights according to their classification.

SEVENTH:—That no part or portion of the main track of said section of railroad shall be occupied by either party by standing trains, cars or engines, so as to obstruct or delay the movement of trains, cars or engines of the other party, but that the main track or

tracks of the whole of said section shall always be left open and unobstructed for the free passage of all trains, cars or engines of either party.

EIGHTH:—That in case either party wishes to construct any siding, switch or turnout at any point on the line of said section to be used exclusively by said party, the said party shall have the
88 right to construct the same. PROVIDED, HOWEVER, they shall bear the full cost of its construction, and in case the other party shall desire to have and enjoy the joint use of said siding, switch or turnout, they shall have the right to do so by first paying one half the cost of constructing the same.

NINTH:—That the docks, wharves, warehouses, depot grounds and the tracks for the same, and all agents and persons employed therein, the engine houses, shops and shop grounds, and all persons employed therein of each party at Duluth, shall be under the control of and subject to the general superintendents of the respective parties.

TENTH:—IT IS MUTUALLY UNDERSTOOD AND AGREED, that the party of the first part shall have the joint use of the track to be
89 constructed across Rice's Point and thence eastward along Dock street, in said city and harbor of Duluth, upon notice to the party of the second part of a desire for the joint use of said track, and first paying one half the cost of said track, to the end that the party of the first part may have the free and unobstructed use of its docks, wharves and warehouses to be constructed between Ninth Avenue West and Minnesota Point, in said City of Duluth, and that said track, when so jointly used by the parties hereto, shall be considered a main track, and shall be kept open and unobstructed for the free passage of the trains, engines and cars of both parties.

ELEVENTH:—That any dispute, difficulty or disagreement between the parties hereto as to the true intent and meaning of this agreement, or to any part thereof, or as to anything to be done or omitted by either party hereunder shall (except where it is herein-
90 before otherwise provided) be referred to and decided by three disinterested railroad experts, one to be chosen by each of the parties hereto, and the third by the two thus chosen: and the decision of the said referees, or a majority of them, shall be absolutely binding, final and conclusive upon the parties hereto and each of them, and may be enforced by proper process at law, or in equity, PROVIDED, HOWEVER, that if either party hereto shall omit or neg-

lect to appoint a referee for more than twenty days after having received from the other party written notice of the matter in dispute and of the name and residence of the referee appointed by the other party, then the referee thus appointed shall choose another and these two shall choose a third, and the decision of the three, or of a majority of them, shall be absolutely binding, final and conclusive as aforesaid.

That all local freight and passenger fares from Duluth to the 91
junction near Thomson aforesaid, or points between Duluth and said junction, and all such local freights and fares from said junction to Duluth and intermediate points, shall be carried or transported at a uniform rate by said several parties, such rates to be fixed from time to time by the superintendents of said companies, and that in case the amount received for such fares and freights by either of said companies shall exceed that received by the other, then the company receiving such excess shall pay to the other party forty (40) per cent of the amount of such excess, the residue of such excess, towit: Sixty per cent. thereof is to be retained by such company or corporation for handling and transportation.

Monthly statements of such earnings for local freights, etc., 92
above specially provided for, shall be made by the superintendent of said section of road: duplicate copies of which shall be delivered to each of the parties hereto, and the amount upon the basis aforesaid paid to the company entitled thereto.

In Witness Whereof, the said parties of the first and second parts have caused their respective common and corporate seals to be hereto affixed and these presents to be signed by their respective presidents and secretaries the day and year first above written.

Frank H. Clark,
President of the Lake Superior and
Mississippi Railroad Co.

(Corporate Seal.)

S. W. Colton, Jr.,
Asst. Secretary of the Lake Sup. and 93
Miss. R. R. Co.

Signed, sealed and delivered in behalf of the Lake Superior and Mississippi R. R. Co.

James Smith, Jr.,
J. H. Dingee, Jr.
J. Greegory Smith,
(Corporate Seal.) Prest. Nor. Pacific Railroad Co.

SAM'L WILKESON,
Secretary of the Northern Pacific
Railroad Company.

Signed, sealed and delivered in behalf of the Northern Pacific Railroad Company in the presence of

JAS. P. SINNOT,
94 CHARLES NETTLETON.

STATE OF NEW YORK, }
City and County of New York. } ss.

Be it remembered that on this twelfth day of January, A. D. 1872, before me the undersigned Charles Nettleton, a commisioner, resident in the City of New York, duly commissioned and qualified by the executive authority and under the laws of the State of Minnesota, to take the acknowledgements of deeds, etc., to be used or recorded therein, personally appeared J. Gregory Smith, the president of the Northern Pacific Railroad Company, and Samuel Wilkeson, the secretary of the same company, to me personally known to be such, and being by me duly sworn did depose and say, that
95 he, the said J. Gregory Smith resided at St. Albans, in the State of Vermont; that he, the said Samuel Wilkeson, resided in Suffolk County, in the State of New York: that he, the said J. Gregory Smith was the president of the said company: that he the said Samuel Wilkeson, was the secretary of the same company: that they know the corporate seal of said company: that the said seal affixed to the foregoing instrument is such seal: that it was so affixed thereto by order of the board of directors of said company: and that they severally signed their names thereto by the like order as president and secretary of the said company respectively: and the said J. Gregory Smith and Samuel Wilkeson also severally acknowledged that they executed the said instrument as their free and voluntary act and deed, and as the free and voluntary act and deed of the said, The Northern Pacific Railroad Company for the uses and purposes
96 therein mentioned.

IN WITNESS WHEREOF I have hereunto set my hand and affixed my official seal.

CHARLES NETTLETON,
Commissioner for Minnesota in New York,
(Seal) 117 Broadway, New York City.

STATE OF PENNSYLVANIA }
City and County of Philad'a. } ss.

Be it remembered that on the seventeenth day of January, A. D. 1872, before me the undersigned, J. Paul Diver, commissioner resident in the City of Philadelphia, duly commissioned and qualified by the executive authority and under the laws of the State of Minnesota to take acknowledgement of deeds, etc., to be used or re- 97
corded therein, personally appeared Frank H. Clark, the president of the Lake Superior and Mississippi Railroad Company, and S. W. Colton, Jr., the assistant secretary of the same company, personally known to me to be such, and being by me duly sworn, did depose and say that he, the said Frank H. Clark, resided in the City of St Paul, State of Minnesota, that he, the said S. W. Colton, Jr., resided in the City of Philadelphia, State of Pennsylvania, that he, the said Frank H. Clark was the president of the company: that he, the said S. W. Colton, Jr., was assistant secretary of the said company: that they know the corporate seal of said company: that the seal affixed to the foregoing instrument is the corporate seal, that it was affixed thereto by the order of the board of directors of said company, and that they severally signed their names thereto 98
by the like order as president and assistant secretary of the said company respectively, and the said Frank H. Clark and S. W. Colton, Jr., also severally acknowledged that they executed the said instrument as their free and voluntary act and deed, and as the free and voluntary act and deed of the Lake Superior and Mississippi Railroad Company, for the uses and purposes therein mentioned.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal as such commissioner.

PAUL J. DIVER,
Commissioner of deeds, etc., for the
State of Minnesota.

99

EXHIBIT "B 1."

Lake Superior and Mississippi Railroad Company
to
Northern Pacific Railroad Company.

100 LEASE OF ROAD.

Dated May 1st, 1872.

THIS INDENTURE made this first day of May, in the year of our Lord, one thousand eight hundred and seventy-two between the Lake Superior and Mississippi Railroad Company, of the first part, and the Northern Pacific Railroad Company of the second part.

WHEREAS the said Lake Superior and Mississippi Railroad Company, the party hereto of the first part, is a railroad corporation, duly created and organized under certain acts of the legislature of the former territory of Minnesota and existing and carrying on business as such corporation under the constitution and laws
101 of the State of Minnesota.

AND WHEREAS the said party of the second part is a corporation created and organized under an act of Congress of the United States, entitled "An Act granting lands to aid in the construction of a railroad and telegraph line from Lake Superior to Puget Sound, on the Pacific Coast by the Northern route," approved July 2, 1864, and existing as such corporation under said act and under certain congressional resolutions amendatory thereof, as well as under certain legislative acts of the States of Minnesota and Wisconsin, respectively.

AND WHEREAS the said party of the first part is in possession of and duly authorized to operate a certain railroad, commonly known as the Lake Superior and Mississippi Railroad which extends from the City of St. Paul in the County of Ramsey, and the
102 State of Minnesota, to the waters of Lake Superior, in the City of Duluth, in the County of St. Louis, and the same State, being a distance of one hundred and fifty-six (156) miles, more or less.

AND WHEREAS the said party of the first part is the sole owner of said railroad, and of the depots, depot grounds, lands and premises connected therewith, except as to a portion thereof, lying between the point of connection thereof, with the Northern Pacific

Railroad hereinafter described, and the center line of Lake avenue in the said city of Duluth, being a distance of twenty-six (26) miles, more or less, in respect to which twenty-six miles, the said party of the first part has heretofore executed and delivered to the said party of the second part, a deed upon condition, conveying to the said party of the second part, an equal undivided interest in such twenty-six miles, or thereabouts, of said railroad conditioned upon the payment of the purchase money thereof, and of the interest thereon, at the times, and in the manner mentioned and set forth in the said deed, which bears date on the first day of January, 1872, and to which reference is for greater certainty hereby made. 103

And Whereas the said railroad now being constructed by the said party of the second part, and which is known as the Northern Pacific Railroad, connects at or near the town of Thomson, in Carlton County, in the said State of Minnesota, with the Lake Superior and Mississippi Railroad aforesaid, and it is believed by the parties hereto, to be for their mutual interest that the said Northern Pacific Railroad and the said Lake Superior and Mississippi Railroad should be operated under one and the same management and control. 104

And Whereas, the said party of the first part, heretofore, to-wit, on or about the first day of January in the year of our Lord, one thousand eight hundred and sixty-nine, duly executed and delivered to J. Edgar Thomson and William G. Moorhead, both of the City of Philadelphia, in the State of Pennsylvania, a deed of trust or mortgage, bearing date on that day whereby the said party of the first part granted and conveyed the said Lake Superior and Mississippi Railroad and all the rights and franchises, connected and to be connected therewith, and all the rights, title and interest of the said party of the first part in and to the lands granted by the Congress of the United States to aid in the construction thereof, and all property whatsoever, both present and future of the said party of the first part, to the said J. Edgar Thomson and William G. Moorhead, in trust to secure the payment of a certain issue of bonds of the said party of the first part, amounting in the aggregate to four millions and five hundred thousand dollars, and which are designated in the First Mortgage Sinking Fund Land Grant Bonds of the said party of the first part, and are payable on the first day of January, A. D. 1896, in gold coin of the United States of America, to bear interest at the rate of seven per cent. per annum, payable 105

semi-annually, namely on the first days of January and July in each year in the like gold coin, free of United States taxation, until the principal sum is paid as by reference to the said Deed of Trust or Mortgage, which has been duly recorded, and will more fully and at large appear.

And Whereas, afterwards to-wit, on or about the first day of April, in the year of our Lord one thousand eight hundred and
106 seventy the said party of the first part, duly executed and delivered to the said trustees a certain other deed of trust or mortgage bearing date on said last mentioned day whereby the said party of the first part again granted and conveyed the said Lake Superior and Mississippi Railroad and all the rights and franchises connected and to be connected therewith, and all right, title and interest of the said party of the first part in and to the lands granted by the Congress of the United States to aid in the construction thereof to the said Trustees subject, however, to the deed of trust or mortgage aforesaid, except as to certain lands in the City of Duluth, which had been acquired subsequently to the execution and delivery of said First Deed of Trust or Mortgage to secure the payment of a
107 certain other issue of bonds of the said party of the first part amounting in the aggregate to the sum of three millions two hundred thousand dollars, and which are designated the Second Mortgage Land Grant Bonds of the said party of the first part and are payable on the first day of October, A. D. 1900, and bear interest payable semi-annually, and the principal and interest whereof are both payable in gold coin of the United States of America, free from taxation either by the United States or by the State of Minnesota as by reference to the said second Deed of Trust or Mortgage which has been duly recorded, will more fully and at large appear.

And Whereas, on or about the first day of November in the year of our Lord one thousand eight hundred and seventy, the Stillwater and Saint Paul Railroad Company, a certain railroad cor-
108 poration existing in the State of Minnesota, duly executed and delivered to the said party of the first part hereto a certain Indenture of Lease or Agreement, bearing date on that day whereby the said Stillwater and Saint Paul Railroad Company covenanted and agreed to lease, and did demise, lease and let unto the said party of the first part, for the term of nine hundred and ninety-nine years from the first day of January one thousand eight hundred and sev-

enty-one, a certain line of railroad then in process of construction belonging to the said Stillwater and Saint Paul Railroad Company, and extending from Stillwater in the County of Washington to a point on the said Lake Superior and Mississippi Railroad at or near White Bear Lake in the County of Ramsey, and the same State.

And, Whereas, the said Stillwater and St. Paul Railroad Company had heretofore provided for the issue of certain bonds amounting in the aggregate to four hundred thousand dollars in 109
gold and bearing interest at the rate of seven per centum per annum payable in gold coin of the United States of America, free from such taxes as the said company might be required to deduct therefrom under the laws of the United States, or of the state of Minnesota: And Whereas, in order to secure the payment of the principal and interest of said bonds, the said company had by a Deed of Trust or Mortgage bearing date of the first day of November one thousand eight hundred and seventy, granted and conveyed the said railroad which it was authorized to construct, and also the lands granted by the congress of the United States to aid in the construction thereof, unto Samuel M. Felton, and William G. Moorhead, as trustees and the said premises are subject to the lien 110
of the said mortgage.

And Whereas, the said Indenture of lease or agreement, reserved as the annual rent thereunder, a sum equal to seven per centum per annum, on a principal of four hundred thousand dollars payable in gold, together with the amount of taxes, which the said company by omitting to deduct the same from the interest of said bonds, should become liable to pay.

And Whereas, on or about the fifth day of June in the year of our Lord one thousand eight hundred and seventy-one, the Minneapolis and Duluth Railroad Company, a certain railroad corporation existing in the State of Minnesota, duly executed and delivered to the said party of the first part hereto, a certain indenture of lease or agreement bearing date on that day whereby the said Minneapolis and Duluth Railroad Company covenanted and 111
agreed to lease and did demise, lease and let unto the said party of the first part, for the term of nine hundred and ninety-nine years from the first day of September one thousand eight hundred and seventy-one, a certain line of railroad then in process of construction belonging to the said Minneapolis and Duluth Railroad Company and extending from a point at or near the junction depot

of the First Division of the St. Paul and Pacific Railroad Company in St. Anthony in a north easterly direction to a point of junction with the said Lake Superior and Mississippi Railroad, at or near White Bear Lake in the county of Ramsey and same state.

And, Whereas, the said Minneapolis and Duluth Railroad Company had theretofore provided for the issue of certain bonds,
112 amounting in the aggregate to four hundred thousand dollars in gold, and bearing interest at the rate of seven per centum per annum, payable in gold coin of the United States of America, free from such taxes as the said company might be required to deduct therefrom under the laws of the United States or of the state of Minnesota.

And, Whereas, in order to secure the payment of the principal and interest of said bonds, the said company had by a deed of trust or mortgage dated on the twentieth day of May in the year of our Lord one thousand eight hundred and seventy-one granted and conveyed the said railroad, which it was authorized to construct unto the Fidelity Insurance Trust and Safe Deposit Company of Philadelphia, Pennsylvania, as trustee, and the said premises are
113 subject to the lien of said mortgage.

And, Whereas, the said indenture of lease or agreement reserved as the annual rent thereunder, a sum equal to seven per centum per annum, on a principal of four hundred thousand dollars, payable in gold together with the amount of taxes which the said company, by omitting to deduct the same from the interest on said bonds, should become liable to pay.

And, Whereas, on or about the twenty-fourth day of October in the year of our Lord one thousand eight hundred and seventy-one, the Minneapolis and Saint Louis Railway Company, a certain railroad corporation existing in the state of Minnesota, duly executed and delivered to the said party of the first part hereto a certain indenture of lease or agreement, bearing date on that day,
114 whereby the said Minneapolis and Saint Louis Railway Company covenanted and agreed to lease and did demise, lease and let unto the said party of the first part for the term of nine hundred and ninety-nine years from the first day of November in the year of our Lord one thousand eight hundred and seventy-one a certain line of railroad then in process of construction, belonging to the said Minneapolis and Saint Louis Railway Company and extending from a point within the city of Minneapolis to a point on the Saint

Paul and Sioux City Railroad in the county of Scott in the same state.

And Whereas, the said Minneapolis and Saint Louis Railway Company had theretofore provided for the issue of certain bonds amounting in the aggregate to seven hundred thousand dollars in gold, and bearing interest at the rate of seven per centum per annum, payable in gold coin of the United States of America, free from such taxes as the said company might be required to deduct therefrom under the laws of the United States or of the State of Minnesota: And whereas, in order to secure the payment of the principal and interest of the said bonds, the said company had, by a deed of trust or mortgage, bearing date the first day of July, one thousand eight hundred and seventy-one, granted and conveyed the said railroad, which it was authorized to construct, unto the Fidelity Trust and Safe Deposit Company of Philadelphia, Pennsylvania, as trustees, and the said premises are subject to the lien of mortgage. 115

And Whereas, the said indenture of lease or agreement reserved as the annual rent thereunder a sum equal to seven per centum per annum, on a principal of seven hundred thousand dollars, payable in gold, together with the amount of taxes which the said company, by omitting to deduct the same from the interest, on said bonds, should become liable to pay. 116

Now Therefore this Indenture Witnesseth, that for and in consideration of the premises, and of the rents, covenants and agreements hereinafter mentioned, reserved and contained on the part and behalf of the said party of the second part, to be paid, kept and performed, the said party of the first part to these presents has granted, demised and leased and by these presents does grant, demise and lease unto the said party of the second part, its successors and assigns, all and *singular* that certain railroad situate, lying and being in the state of Minnesota, and which is known as the Lake Superior and Mississippi Railroad, and which extends from the terminus thereof, within the city of St. Paul, in the county of Ramsey, to the waters of Lake Superior in the city of Duluth, and the county of St. Louis, being a distance of one hundred and fifty-six miles, more or less, *together* with the lands and premises occupied by and connected therewith and together with the rolling stock, equipments and appurtenances of the said railroad, belonging to the said party of the first part, and all rights, privileges and 117

franchises of the said party of the first part, necessary to the operation and management of the said railroad or the business thereof, including in the premises hereby demised, all the railways, ways, rights and rights of way, and all the depot grounds, and all the tracks, bridges, viaducts, culverts fences and other structures and all the depots, station houses, engine houses, car houses, freight
118 houses, wood houses, and other buildings and all the machine shops and other shops, and all lands and premises whatsoever, belonging to the said party of the first part and which have been heretofore used or acquired for use in connection with the said Lake Superior and Mississippi Railroad or the business thereof: but excluding and excepting, however, from the lands and premises hereby demised, all lands granted by the congress of the United States, or by the State of Minnesota, to aid in the construction of the said railroad, or otherwise acquired, which did not constitute any part of the roadbed of said railroad or of the lands reserved or intended for such roadbed or any part of the land used for the depot or station purposes, and which have not been heretofore used or acquired for use in connection with said demised railroad or the
119 business thereof, and upon which none of the buildings or structures hereinbefore mentioned are erected, built or located: and excepting also, certain lots, pieces and parcels of land in the said city of Duluth, beyond the terminus of said railroad as now constructed, which lots, pieces and parcels of land are situate northeasterly of the Breakwater, as now constructed in the harbor of said city, and lie between said Breakwater and Chester Creek, and are, taken together, bounded on one side by Superior street and on the other side by the waters of Lake Superior, and were heretofore acquired by the said party of the first part otherwise than by said congressional and legislative grants. PROVIDED, HOWEVER, that the party of the second part, at any time within ten years after the date of this lease, shall have the right and privilege of occupy-
120 ing for the term of said lease not more than one hundred feet in width of said lands last reserved from this lease for any distance upon the same in a northeasterly direction between the Breakwater and Chester Creek, as a roadbed for any railroad tracks and as a site for any structures for railroad purposes which the said party of the second part shall deem desirable for the uses and business of the said demised railroad, and also the right to occupy for wharves or any purposes connected with said business not more

than five hundred lineal feet in width of the said land along shore of the said lake.

AND THIS INDENTURE FURTHER WITNESSETH that, for the consideration aforesaid, the said party of the first part has sold, assigned, transferred and set over, and by these presents does sell, assign, transfer and set over unto the said party of the second part, its successors and assigns all the right, title and interest of the said party of the first part in and to the lease and agreement bearing 121
date on the first day of November one thousand eight hundred and seventy, made by the Stillwater and Saint Paul Railroad Company to the said party of the first part hereinbefore recited, and all the right, title and interest of the said party of the first part in, to and concerning the railroad and premises in the said lease or agreement mentioned and described: AND ALSO, all the right, title and interest of the said party of the first part, in and to the lease or agreement, bearing date on the fifth day of June, A. D. one thousand eight hundred and seventy-one, made by the Minneapolis and Duluth Railroad Company, to the said party of the first part as hereinbefore recited, and all the right, title and interest of the said party of the first part in, to and concerning the Railroad and prem- 122
ises in the said lease or agreement made by the said Minneapolis and Duluth Railroad Company mentioned and described: AND ALSO ALL the right, title and interest of the said party of the first part in and to the lease or agreement bearing date on the fourth day of October, A. D. one thousand eight hundred and seventy-one, made by the Minneapolis and Saint Louis Railway Company, to the said party of the first part as hereinbefore recited, and all the right, title and interest of the said party of the first part in, to and concerning the railroad and premises in the said Lease or Agreement so made by the said Minneapolis and St. Louis Railroad Company mentioned and described.

TO HAVE AND TO HOLD the said Lake Superior and Mississippi Railroad, and the land and premises connected therewith and hereinbefore demised, unto the said party of the second part, its 123
successors and assigns, for, during and until the full end and term of nine hundred and ninety-nine years, next ensuing the date hereof, the said party of the second part, its successors and assigns yielding and paying therefor unto the said party of the first part, its successors and assigns yearly and every year the yearly rent hereinafter specified, and keeping and performing the covenants

and agreements hereinafter set forth, to be by the said party of the second part kept and performed: *but subject nevertheless* to the lien of the deed of trust or mortgage aforesaid made by the said party of the first part to J. Edgar Thomson and William G. Moorehead, to secure certain bonds to the amount of Four Millions Five Hundred Thousand Dollars hereinbefore recited as being the first mortgage sinking fund land grant bonds to the said party of the
124 first part.

And to Have and to Hold also the said several Indentures or Lease or Agreement hereinbefore assigned, and the railroads and premises therein respectively mentioned and described, unto the said party of the second part, its successors and assigns, for and during the respective unexpired terms of said Leases or Agreements but subject to the Deeds of Trust or Mortgage in said Leases or Agreements respectively mentioned, and to which said Leases or Agreements are respectively subject.

And this Indenture Further Witnesseth that the said Lake Superior and Mississippi Railroad is granted and demised, and the said several indentures of Leases are assigned and set over
125 unto the said party of the second part, upon the terms, conditions and agreements hereinafter mentioned and set forth: and that the said parties to these presents have promised and agreed and by these presents do covenant, promise and agree to and with each other in the manner and following, to-wit:

Article First: The Second Mortgage or Deed of Trust executed by the party of the first part to J. Edgar Thomson and William G. Moorehead of Philadelphia to secure bonds amounting to three million two hundred thousand dollars, being at the date hereof a lien upon the railroad and premises hereinbefore demised, the said party of the first part hereby covenants, promises and agrees that it shall and will within a reasonable time from the date hereof, procure and cause the bonds and coupons secured to be paid by said second mortgage to be surrendered and canceled and
126 the said second mortgage to be satisfied of record, so that the said party of the second part, may and shall hold and possess the said demised Lake Superior and Mississippi Railroad and the premises connected therewith, and not excepted or reserved from this lease, subject only to the First Mortgage or Deed of Trust made to the said J. Edgar Thomson and William G. Moorehead to secure the payment of the bonds hereinbefore designated as the First

Mortgage Sinking Land Grant Bonds of the said party of the first part.

And the said party of the first part further promises agrees and guarantees that it shall and will at all times hereinafter indemnify and save harmless the said party of the second part from and against said second mortgage, and the bonds thereby secured to be paid, and from and against any and all claims and demands, and any and all loss and damage whatsoever arising out of or resulting 127
from the said second mortgage, or the bonds thereby secured to be paid.

PROVIDED ALWAYS, and it is hereby agreed, that the said party of the first part, in order to procure such surrender of said second mortgage bonds, may issue an equal amount of Income Bonds, in exchange for said second mortgage bonds, which Income Bonds may be secured by mortgage on said demised premises and on the lands granted by congress, as aforesaid, to aid in the construction of certain railroads, but subject always to this indenture and the provisions thereof.

ARTICLE SECOND: It is hereby covenanted, promised and agreed by and between the parties to these presents that for the 128
purpose of computing and determining the amount of money payable in each year by the said party of the second part, as and for the rent of the railroads and premises aforesaid, the said Lake Superior and Mississippi Railroad, the said Stillwater and Saint Paul Railroad, the said Minneapolis and Duluth Railroad and the said Minneapolis and Saint Louis Railway shall be deemed and taken to be and constitute but one line of railroad, PROVIDED HOWEVER, that in computing the rental to be paid under this indenture the earnings for transportation over the portion of said railroad lying between the junction of the railroads of the parties hereto, at or near Thomson aforesaid, and the center line of Lake Avenue in the city of Duluth of freight or passengers passing over the same from the Northern Pacific Railroad, or passing over the same to the said Northern Pacific Railroad destined to go to or by way 129
of a point on said Northern Pacific Railroad, and the amount thereof shall be deducted from the gross sum upon which the rental herein preserved shall be computed: and provided further that one-half of the earnings arising from all business strictly local to the said twenty-four miles of road, namely all traffic arising and completed thereon shall be deducted from such gross sum, and that

the balance only including the earnings of said leased lines shall be deemed to be the gross earnings of the said demised railroad upon which the rental hereby reserved shall be computed; PROVIDED, HOWEVER, and this agreement is upon the condition that in addition to paying the percentage upon said gross earnings hereinafter mentioned as the rental hereby reserved, the said party of the second part shall also well and truly pay in each and every year
130 the sum of thirty-five thousand dollars in gold as provided in the Deed upon condition bearing date January 1, 1872, hereinbefore mentioned until the principal sum of Five hundred thousand dollars mentioned in said Deed shall be paid, when such additional payment of Thirty-five thousand dollars per annum shall cease, and from thenceforth the rental shall be limited to the percentage of gross earnings computed as aforesaid hereinafter specified.

And the said party of the second part covenants, promises and agrees that the said several lines of railroad being so, treated as forming but one line of railroad, subject to the provisos hereinbefore set forth, the said party of the second part shall and will in each and every year of the term hereinbefore granted well and
131 truly use, apply and pay or cause to be paid, in the manner and to the parties respectively hereinafter mentioned, not less than thirty per centum of the total aggregate gross earnings of the said railroads, that is to say, the said party of the second part will pay out of said gross earnings to the Stillwater and Saint Paul Railroad Company aforesaid, in equal semi-annual installments the sum of twenty-eight thousand dollars per annum, at the Agency of the said Company in the City of New York, on the first days of June and December in gold coin of the United States of America, and in addition thereto shall pay to the Treasurer of the party of the first part such taxes as the said company may be liable to pay under the provisions of the First Mortgage Bonds, issued by it as hereinbefore recited, and one thousand dollars in United States Currency, the latter sum being the amount provided in said lease to be paid
132 to maintain the corporate organization of said Company, and the said party of the second part shall pay to the Minneapolis and Duluth Company aforesaid, in equal semi-annual installments at the Agency of the Company in the City of New York, on the first days of May and November, the like sum of twenty-eight thousand dollars per annum in gold coin of the United States of America, and in addition thereto shall pay to the Treasurer of the party of the

first part, such taxes as the said Minneapolis and Duluth Railroad Company may be liable to pay under the provisions of the First Mortgage Bonds issued by it as hereinbefore recited: and the said party of the second part shall also pay to the Minneapolis and Saint Louis Railway Company aforesaid, equal semi-annual installments at the Agency of the said Company, in the City of New York, on the first days of January and July, the further sum of forty-nine thousand dollars per annum in gold coin of the United States of America, and also to the Treasurer of the party of the first part hereto all such taxes as the said Company may be liable to pay under the provisions of the First Mortgage Bonds: PROVIDED, HOWEVER, that nothing herein contained shall be held to require or authorize the payment of rental under said leases respectively, except in the manner and to the extent that the said party of the first part to these presents had agreed to pay the same and provided further that the said party of the first part shall pay the yearly sums required by the leases of the said Minneapolis and Duluth and the said Minneapolis and Saint Louis Railroads as sinking funds. 133

AND the said party of the second part will pay, in each and every year of the said term, to the said party of the first part, its successors and assigns such surplus of the said thirty per centum of the total gross earnings as shall or may remain after paying or providing for the payment of such rents under said assigned leases, as and for the rent hereby reserved as payable on account of the said Lake Superior and Mississippi Railroad during said term, PROVIDED always, that the said party of the second part shall have the right to apply any and all moneys becoming due, or as or for such rent, in and to the payment, so far as necessary or sufficient, of the semi-annual interest on said First Mortgage Sinking Fund Land Grant Bonds and such taxes as the said first party of the first part may be liable to pay thereon, and that the delivery to the said party of the first part by the said party of the second part of the coupons representing interest so paid, shall in all cases be equivalent to the direct payment of the sums thereby represented. 134 135

But in case the party of the first part shall notify the party of the second part in writing, at least thirty days before any semi-annual interests on its said bonds shall become due and payable, that due provision has been made for the payment of the same by the sales of lands of the party of the first part or otherwise, and shall furnish to the party of the second part satisfactory evidence

of the fact, then and in that case, the said party of the second part shall not apply such portion of said rent to the payment of the interest for the payment of which provisions shall have been made by the said party of the first part directly, on the day when such interest shall fall due, after deducting therefrom such amount as the said party of the first part may then be indebted to the said
136 party of the second part for or on account of advance theretofore made on its behalf pursuant to this Lease.

And the said party of the second part further promises and agrees that in case during any six months of the period of five years next following the date hereof, the proportion of thirty per centum of the gross earnings of the said railroads shall not be equal to the aggregate of six months interest on the said first mortgage bonds of the said party of the first part including such taxes as may be payable on said interest, and six months rent under the leases hereinbefore assigned the said party of the second part shall, if necessary, and may take up and hold uncancelled, and in full force, validity and effect an amount of coupons representing interest on said First Mortgage Bonds, equal to such deficiency which
137 coupons the said party of the first part hereby promises and agrees shall be paid and discharged with interest at and after the rate of seven and three-tenths (7 3-10) per centum per annum, payable in gold coin of the United States of America, out of the first sales of lands, which shall thereafter be made by or on account of the said party of the first part, and the proceeds of such sale shall in all cases be devoted to the payment thereof so far as necessary.

And the said party of the second part further promises and agrees, that in case in any year the gross earnings of the said entire line of railroad shall exceed the sum of One Million Four Hundred Thousand dollars in gold coin of the United States of America or the equivalent thereof in lawful money of the United States, according to the price of gold at the date when the rental aforesaid, shall be payable, so that Thirty per centum thereof will
138 pay and discharge the rentals reserved under said assigned leases, and in addition thereto, the interest on said First Mortgage Bonds of the said party of the first part as aforesaid and leave a surplus then and for such year, the amount payable as rental in respect to the said line of railroad, shall be as follows: First, Thirty per centum on One Milllion Four Hundred Thousand dollars in gold and next Fifty per centum in currency upon each one hundred

thousand dollars in currency of the excess of said total gross earnings over and above the said sum of One Million four hundred thousand dollars in gold: PROVIDED, HOWEVER, that the total rent to be paid by the said party of the second part for or in respect to any one year of the term hereby demised, including the rents of the lines leased by the said party of the first part as aforesaid, shall never exceed an amount equal to Four hundred and twenty thousand dollars in gold, and Three hundred and twenty-one thousand dollars in currency and all taxes payable by the parties of the first part, the said sum of Three hundred and twenty-one thousand dollars being equivalent to Ten per centum on the Income Bonds hereinb fore mentioned, to be issued in exchange for second mortgage bonds, to be paid directly to the parties of the first part, in whole or in part as earned, on the first days of April and October, and the sum of One thousand dollars, necessary to be paid, to maintain the organization of the Stillwater and Saint Paul Railroad Company, under the lease hereinbefore recited: AND PROVIDED FURTHER, that nothing in these presents contained shall require the said party of the second part to pay the Fifty per cent aforesaid on any fractional part of any one hundred thousand dollars increase in annual gross earnings over the said sum of one million four hundred thousand dollars in gold. 139 140

ARTICLE THIRD: The said party of the second part promises and agrees that it shall and will at its own proper cost and expense, and without deduction from the rent aforesaid, operate and run the said demised railroads at all times during the said term in the same manner as the said party of the first part, as the owner thereof or otherwise, is now or shall or may at any time hereafter be required by law to do: and the said party of the second part shall and will, at its proper cost and expense and without deduction from the rent aforesaid, at all times during the said term maintain, preserve and keep said railroad and premises and every part of the same in good working order and condition, and supplied with rolling stock and equipment, adequate to its business. And the said party of the second part further promises and agrees that it shall and will at its own proper cost and expense, and without deduction from the rent aforesaid from time to time, and whenever needed, during the term aforesaid do or cause to be done to and upon the said demised railroad and premises any and all repairs, replacements and renewals which may be reasonably required for the 141

purposes aforesaid, and provide thereon such rolling stock and equipment, and other facilities, as shall or may be reasonably required for the purposes aforesaid: and that the said party of the second part shall and will use all reasonable efforts to maintain, develop and increase all the business of said railroad.

AND the said party of the second part further promises and agrees that it shall and will at all times during the term aforesaid,
142 hold, save and keep harmless and indemnified the said party of the first part, of, from and against any and all expenses of operating the railroad and premises hereby demised, and all damages, liabilities, actions and causes of action, suits, claims and demand for injuries to persons or property, or for causing the death of any person or thing through accident, neglect or default during said term, or for breach of contract, or wrong done or suffered by reason of the said party of the second part refusing to transport, or its negligence in transporting any person, property or thing, or by the loss, conversion or non-delivery of any property which the said party of the second part shall have agreed or undertaken or be bound to transport over the said railroads, or which the said party
143 of the first part as the owner of the said railroad hereby demised is or shall be under any legal obligation by public duty to transport thereon: and of from and against, any and all costs, damages, liabilities, actions and causes of action, suits, claims and demands whatsoever which shall or may arise out of, or in respect to the management, operation or business of the said demised railroad and premises during the term aforesaid, and the said party of the second part shall and will defend all suits and claims which shall or may be brought against the party of the first part during the said term, in respect to any matter or thing arising out of the operation or management of said demised railroads while the same shall be in the possession of the said party of the second part under these presents.

AND the said party of the first part on its part hereby cove-
144 nants, promises and agrees that it shall and will at all times hereafter indemnify and save harmless the said party of the second part to these presents of, from and against any and all costs, charges, expenses, liabilities, claims and demands whatsoever which can or may arise to or be brought against or incurred by the said party of the second part, for or on account, or in respect to the organization, construction, management or operation here-

tofore of the said Lake Superior and Mississippi Railroad or the other railroads of which Leases are hereinbefore assigned, or for or on account of any rent heretofore accrued on said assigned leases or either of them: and that the said party of the second part, paying the yearly rental aforesaid, and keeping and performing the covenants and agreements mentioned and set forth in these presents, to be by it kept and performed, shall and may peaceably and quietly have, hold, possess and enjoy the said Lake Superior 145
and Mississippi Railroad, and the demised premises connected therewith, the term hereinbefore granted, and also the railroads and premises of which leases are hereinbefore assigned, for the terms granted by the said leases respectively: and further that the said party of the first part has good right and lawful authority to grant and demise the said Lake Superior and Mississippi Railroad as aforesaid, and to sell and set over the said hereinbefore assigned leases in the manner and form in which the said party of the first part have hereinbefore sold, assigned and set over the same unto the said party of the second part.

ARTICLE FOURTH. The said party of the first part hereby promises and agrees to pay and discharge in each and every year of the said term, any and all taxes which may become payable 146
upon or in respect to the gross earnings or receipts of said demised railroads or any of them, unless said gross earnings for such year shall exceed the sum necessary to produce at the percentage and upon the terms hereinbefore set forth, the maximum rental hereinbefore reserved: and in case the total amount of said gross earnings shall in each year exceed the sum necessary to produce such maximum rental, then the said party of the first part shall for and in respect to that year, pay the tax or taxes upon so much of said gross earnings as are necessary to produce at the percentage, and upon the basis aforesaid the said maximum rental: and the said party of the second part shall pay the tax or taxes upon the surplus of said gross earnings over and above the amount thereof so producing such maximum rental, PROVIDED ALWAYS,
that the tax or taxes so to be paid by the said party of the second 147
part shall be a just proportion of the whole tax payable on such gross earnings, computing the same upon the whole sum thereof: and provided further that nothing herein contained shall require the said party of the second part to pay in or for any year a larger sum than under the existing legislation of the State of Minnesota

would be payable upon or in respect to such surplus of gross earnings it being hereby agreed that an increase in the rate of taxation shall be borne by the said party of the first part.

And the said party of the first part hereby agrees to pay and discharge any and all other taxes, assessments, imposts and charges which shall or may during the said term be levied, assessed or imposed upon the said railroads and premises or upon any part or
148 portion thereof.

And Provided further that in case the said party of the first part shall in any year fail or omit to pay the taxes which the said party of the first part has hereinbefore agreed to pay, the said party of the second part may at its own option and not otherwise pay and discharge the same for account of the said party of the first part and charge the amount so paid on account of and against the rental hereinbefore reserved: and the said party of the first part hereby agrees to repay to the said party of the second part any and all sums which the said party of the second part shall so advance to pay taxes, with interest thereon, at the rate of seven and three tenths (7 3-10) per centum per annum.

Article Fifth: The said parties hereto further promise
149 and agree, that in case any of the First Mortgage Bonds aforesaid, of the said party of the first part shall remain outstanding and unredeemed by the operation of the Sinking Fund provided in said Mortgage for the redemption thereof, when the time mentioned in said bonds for the payment of the same shall have arrived, then the said party of the first part shall be entitled, as it may deem most expedient and find most practicable to pay and discharge said outstanding bonds, or to issue and substitute therefore new bonds to not exceeding the same aggregate amount and bearing not exceeding the same rate of interest; and to that end the said party of the first part may execute upon the right, title and interest which it shall then have in the said Lake Superior and Mississippi Railroad; and so much of the land and premises included in the existing First Mortgage, as may then remain subject to the lien
150 thereof a new mortgage to secure the payment of said new First Mortgage Bonds which new mortgages shall be and become a lien on the premises mentioned and described therein prior to the lien of these presents, notwithstanding the priority in time of execution and record of these presents: provided always, that for each and every new Bond so issued an outstanding bond for an equal amount

shall be cancelled or the said party of the first part may procure the time of payment of the principal of said outstanding bonds to be extended by agreement endorsed thereon or otherwise, provided only that the amount of bonds secured by a lien prior to the lien of these presents, shall not thereby be increased beyond the then existing amount, nor shall any higher or greater rate of interest be agreed to be paid thereon.

ARTICLE SIXTH: The said party of the second part promises 151
and agrees that it shall and will while in possession of said railroads, under these presents at all times keep full, true and accurate accounts of the business done upon the said railroads, and that such accounts shall at all reasonable hours and times be open to the inspection and examination of the President, Treasurer or Secretary of the said party of the first part, or any person appointed to examine the same by the Board of Directors of the said party of the first part, which right of inspection shall include the right to take copies of said accounts: and that the said party of the second part shall and will semi-annually, to-wit, on or before the fifteenth days of February and August in each year make up and furnish to the said party of the first part a detailed statement of the earnings and business of said railroads, showing the gross 152
earnings, and the operating expenses, including the cost of repair and replacements during the six months ending with the Thirty-first day of December and the Thirtieth day of June respectively preceding the time of rendering such statement.

ARTICLE SEVENTH: The party of the first part hereby agrees, that for the purpose of enabling the party of the second part to meet the obligations of the party of the first part to the public by making from time to time such improvements upon and additions to the said Lake Superior and Mississippi Railroad in the extension of facilities for increased business by additional tracks and depots, shops and equipments, and the substitution of stone or iron buildings for wooden buildings or steel rails for iron rails, the party of the first part will issue, from time to time to the said party of the second part a special stock which shall bear such 153
name as shall be hereafter agreed upon, or bonds or other securities which shall be issued in such form as may from time to time, be found to be most available with respect to economy of interest and negotiability, and as shall be consistent with the legal powers of the party of the first part, and the rights secured by these

presents: which special stock or bonds or other securities shall be subordinate to the First Mortgage Bonds aforesaid, and the Income Bonds hereinbefore provided to be issued in substitution for Second Mortgage Bonds. But the said special stock or bonds or other securities shall be issued only in respect to improvements of and additions to the said railroad, which, and estimates and specifications of which shall have been submitted to and approved by the
154 said party of the first part in writing, and all such improvements or additions shall be made in such manner as shall be approved by the said party of the first part. And in case of the issue of any stock or bonds by the party of the first part under this article, the party of the second part shall pay to the party of the first part, its successors or assigns an additional sum as annual rent of the demised premises, during the demised term, equal in amount to the annual interest or dividends upon such bonds or stock, and without affecting any of the other provisions of this lease.

ARTICLE EIGHTH: It is hereby covenanted, promised and agreed by and between the parties to these presents, that if, at any time hereafter, that any dispute or difference shall arise between them in regard to the true construction of these premises, or any
155 provision thereof, or in respect to any matter or thing in these presents mentioned to be by either of them done or omitted to be done, such dispute or difference shall be at once submitted to arbitration, and to that end, it shall be the duty of each of the parties hereto upon the occurrence of any such dispute or difference, to appoint, in writing, an arbitrator, to act on its behalf, for the settlement of the same; and to notify in writing the other party of this covenant of such appointment and it is covenanted and agreed that in case the party so notified, shall refuse, fail or omit to appoint an arbitrator to act on its behalf and no appointment of such arbitrator on the part of the party so notified shall be made within the space of thirty days after the service of such notice, the party who shall have appointed and notified the appointment of such arbitrator may and shall forthwith nominate and appoint an arbitrator on the
156 part and behalf of the party so refusing, failing or omitting to appoint one on its own behalf, although so notified in writing, to make such appointment as aforesaid, PROVIDED ALWAYS, that neither party shall nominate or appoint as an arbitrator hereunder, to act either on its own behalf, or on behalf of any party failing to appoint as aforesaid, any person interested in the decision of the

dispute or difference, or any other than an impartial and disinterested person, acquainted with the management and operation of railroads or learned in the law.

THE ARBITRATORS so appointed shall within a reasonable time after their appointment, enter upon their duties, either at Saint Paul, Philadelphia or New York, and their finding and decision, made after a reasonable opportunity shall have been afforded to each party to present its views and claims in respect to the matter in controversy, shall be final and conclusive, as between the said parties hereto in regard to such matter in controversy between them: but in case the said arbitrators so appointed shall be unable to agree upon a decision they shall choose an umpire, and the decision of such umpire if concurred in by either of said arbitrators, shall be final and conclusive in regard to the matter in controversy, submitted to him and in respect to which the said arbitrators shall have disagreed as aforesaid. 157

ARTICLE NINTH: IN case the said party of the second part, its successors or assigns shall at any time or times hereafter, during the term aforesaid, fail or omit to pay the rent hereinbefore mentioned or provided to be paid by the said party of the second part, or any of such rent, when the same shall become payable, as hereinbefore specified or in case the said party of the second part its successors or assigns shall fail or omit to keep and perform the covenants and agreements herein contained, or any of them, and shall continue in default in respect to the performance of such covenant or agreement for the period of ninety days after the said party of the first part shall have in writing, required the performance of such covenant or agreement, then and in either and every such case it shall be lawful for the said party of the first part, its successors or assigns, at its or their own option, to enter in and upon the railroad and premises hereinbefore demised, and any and every part thereof, and remove all persons therefrom, and from thenceforth the said railroad and premises and all additions and improvements which shall or may have been made to the same to have, hold, possess and enjoy, as of the first or former estate of the said party of the first part, in the said demised premises: and upon such entry for non-payment of rent or breach, or non-performance of any covenant or agreement herein contained, to be by the said party of the second part, observed or performed, all the estate, right, title, interest, property, possession, claim and demand 158 159

whatsoever of the said party of the second part, its successors or assigns, in or to the said demised railroad and premises as well as all the right, title and interest of the said party of the second part, its successors or assigns, in, under or by virtue of the Leases or either of them hereinbefore assigned or transferred to the said party of the second part, or assumed by it shall wholly and absolutely cease, determine, and become void, anything hereinbefore
160 contained to the contrary in anywise notwithstanding: but in case of re-entry, as aforesaid, the rent provided in Article Second of these presents shall be apportioned from the times of the last preceding payments, up to the time of such re-entry. And it is further agreed and declared that such re-entry shall not waive or prejudice any claim or right of the party of the first part to, or for damages, against the party of the second part, on account of such non-payment of rent, or non-performance or breach of the terms of this lease, and all such claims and rights, are hereby expressly preserved to the said party of the first part.

ARTICLE TENTH: The said party of the second part hereby covenants, promises and agrees to and with the said party of the first part, that at the end of the said term or other sooner deter-
161 mination of this lease, the said party of the second part shall re-deliver and surrender up to the said party of the first part, its successors or assigns, the said demised railroad and premises, in at least as good order and condition as the same shall be delivered to the said party of the second part under this lease and with such additions, betterments and improvements as shall have been made thereto: and also with an amount and quality of rolling stock equal in value to the rolling stock which shall be delivered to the said party of the second part under this lease.

ARTICLE ELEVENTH: AND the said party of the first part hereby covenants, promises and agrees to and with the said party of the second part, its successors and assigns that the said party of the first part, its sucessors or assigns, shall and will, at any time or times hereafter, and whenever thereunto requested by the said party
162 of the second part, its successors and assigns, execute, acknowledge and deliver to the said party of the second part, its successors or assigns at the proper cost and expense of the said party of the second part, its successors and assigns, any and all such other or further instruments and assurances in the law for the better demising and leasing of the said railways and premises to the said party

of the second part, its successors or assigns, upon and subject to all and singular the rents, covenants, agreements and conditions hereinbefore reserved and mentioned, as by the said party of the second part, its successors or assigns, or by its or their counsel learned in the law, shall be reasonable advised, devised or required.

ARTICLE TWELFTH: IT is hereby mutually agreed that whereas this Indenture necessarily supercedes, during the continuance of the term thereby granted, the contract bearing date on the 163
first day of January in the year of our Lord, one thousand eight hundred and seventy two made between the parties to these presents, relative to the operation and management of the portion of said Lake Superior and Mississippi Railroad, between the point of junction of said Railroad with the Northern Pacific Railroad, at or near the town of Thomson in Carlton County and the center line of Lake avenue in the City of Duluth, the said contract shall, during the continuance of this Lease, be deemed suspended but the same shall not by virtue of these presents, become or be deemed wholly abrogated or annulled: and in case this Lease shall for any reason cease to be determined before the expiration of the term thereby granted, then the said contract shall revive, and from thenceforth the same shall be and continue in full force and operation, as if this 164
said Lease had not been made,

ARTICLE THIRTEENTH. THE said party of the second part hereby agrees to advance, on account of the rent hereinbefore reserved, an amount equal to the six months interest now maturing on the First Mortgage Bonds of the said party of the first part, and the First Mortgage Bonds of the Stillwater and Saint Paul, Minneapolis and Duluth, and Minneapolis and Saint Louis Railroad Companies aforesaid respectively, provided that the coupons, representing such accruing interest shall be transferred and delivered to the said party of the second part and shall be and continue valid in its hands for the purpose of securing the payment of such advances.

IN WITNESS WHEREOF the parties hereof have caused their respective corporate seals to be hereunto affixed, and the same to 165
be attested by the signatures of their respective presidents and secretaries, the day and year first above written.

FRANK H. CLARK,
Pres't. Lake Sup. & Miss. R. R. Co.

(Corporate Seal.)

S. M. Colton, Jr.,
Asst. Sec. Lake Sup. & Miss. R. R. Co.
The Northern Pacific R. R. Co.,
By J. Gregory Smith, President.

(Corporate Seal.)

Sam'l Wilkeson,
Secretary Northern Pacific R. R. Co.

166 Signed, sealed and delivered in the presence of
James P. Sinnott,
Charles Nettleton.

State of New York, }
City and County of New York. } ss.

Be it remembered that on this 6th day of May, A. D. 1872, before me, Charles Nettleton, a commissioner of the State of Minnesota in and for the state of New York, residing in said City of New York, personally appeared Frank H. Clark, the President of the Lake Superior and Mississippi Railroad Company, and S. W. Colton, Jr., the Assistant Secretary of the same company: to me respectively personally known to be such, who being by me
167 severally sworn did depose and say: that he the said Frank H. Clark, resided in the City of St. Paul in the State of Minnesota: that he, the said S. W. Colton, Jr., resided in the City of Philadelphia in the State of Pennsylvania, that he the said Clark was the President and he the said Colton Junior was the Assistant Secretary of the said company: that they know the corporate seal of said company: that the seal affixed to the foregoing instrument was such corporate seal; that it was so affixed thereto by order of the Board of Directors of said company: that they the said Clark and S. W. Colton Junior signed their names thereto by the like order as President and Assistant Secretary of said company respectively: and they each acknowledged the foregoing instrument to be their own free and voluntary act and deed and the free
168 and voluntary act and deed of said Company for the purposes herein mentioned. And also on the same 6th day of May, A. D. 1872, before me personally appeared J. Gregory Smith, the President of the Northern Pacific Railroad Company, and Samuel Wilkeson the Secretary of the said last named company, to me respectively personally known to be such, who being by me severally and duly sworn did depose and say: that he, the said J. Gregory

Smith, resided in St. Albans in the state of Vermont: that he, the said Wilkeson, resided in the said City of New York: that he, said Smith, was the President and he, said Wilkeson, was the Secretary of the said company, and that they know the corporate seal of said last named company: that the seal affixed to the foregoing instrument was such corporate seal: that it was so affixed thereto by an order of the Board of Directors of said company: and that they the said Smith and Wilkeson signed their names 169
thereto by the like order as President and Secretary of said company respectively: and they each acknowledged the foregoing instrument to be their own free and voluntary act and deed and the free and voluntary act and deed of the said company, for the purposes therein mentioned.

IN WITNESS WHEREOF I have hereunto set my hand and affixed my official seal.

CHARLES NETTLETON,
(Seal.) Commissioner for Minnesota in New York,
117 Broadway, N. Y. City.

Filed for record in the office of the Secretary of State, in the State of Minnesota on the seventeenth day of September, 1872, and recorded in records "A" St. Paul & Duluth R. R., pages 180 to 170
207 inclusive.

Exhibit "C."

AGREEMENT.

THE NORTHERN PACIFIC RAILROAD COMPANY, THE LAKE SUPERIOR AND MISSISSIPPI RAILROAD COMPANY.

With

WILLIAM H. RHAWN, ET AL., COMMITTEE OF HOLDERS OF FIRST MORTGAGE BONDS OF THE LAKE SUPERIOR AND MISSISSIPPI RAILROAD COMPANY.

Dated August 9, 1876.

This agreement, made this ninth day of August, Anno Domini, one thousand eight hundred and seventy-six, between the Northern Pacific Railroad Company, party of the first part, the Lake Superior 171
and Mississippi Railroad Company, party of the second part, and William H. Rhawn, Edwin M. Lewis, George Whitney, Nathan Hilles, F. R. Shelton, Edward A. Rollins and Fisher A. Baker, a committee of the holders of the first mortgage bonds of the said Lake Superior and Mississippi Railroad Company appointed December 22d, 1875, parties of the third part,

Witnesseth, That, Whereas, the relation of the said parties of

the first and second parts have extended over a series of years during which a number of contracts and agreements have been made between them, and considerable complication has arisen in determining the exact situation and rights of the said parties of the first and second parts under the said several contracts and the action and dealings thereunder.

And Whereas, proceedings by bill in equity for the foreclosure
172 of the indenture of mortgage known as the first mortgage of the said party of the second part, have been commenced in the Circuit Court of the United States for the District of Minnesota, to which bill for foreclosure the said party of the first part has been, on its own application, admitted as a party defendant, and has filed answer to said bill.

And Whereas, after a series of conferences, terms of agreement and settlement of the several differences and outstanding matters between the said parties of the first and second parts, and covering the various relations and transactions between them, have been arrived at with the approval and consent of the said parties of the third part, who have therefore united in this agreement for the purpose of expressing their assent to, and approval of, said terms, as well as to insure the carrying out of the same, in and by said fore-
173 closure proceedings and the decree therein made, as also, in the contemplated organization of the said Lake Superior and Mississippi Railroad Company under the proposed purchase of its railroad property and franchises by the committee, parties of the third part as aforesaid.

Now, in consideration of the premises, and of the several covenants and agreements herein contained, on the part of the respective parties hereto, it is hereby covenanted and agreed as follows:

1. It is hereby admitted and agreed that the said parties of the first part, The Northern Pacific Railroad Company and its assigns, are the holders and lawful owners, subject, however, to the rights therein of such persons who may have made advances on the same or parts of the same as pledges thereof, of one hundred and eighty-three thousand, seven hundred dollars and fifty-five cents ($183,-
174 700.55) of unpaid coupons, secured by the first mortgage executed by the said party of the second part, the same being and representing coupons taken up by the said party of the first part under the provisions of the lease, formerly existing, of the railroad of the said party of the second part, to said party of the first part, beyond the amount of money in its hands for that purpose; and less amount since paid to said party of the first part and now held by, or in trust for, the said party of the first part and its assigns, which said coupons are entitled under the terms of said lease to all the benefits

of said indenture of mortgage, and are of equal force and validity, in all respects as the same amount of first mortgage coupons of the said party of the second part falling due on or since January 1st, 1874, and remained unpaid. And it is further agreed that the rights of said party of the first part and its assigns, as bona fide holders and owners of said coupons, shall be recognized and protected, as well in any degree to be made in said foreclosure proceedings, as in any organization of the said Lake Superior and Mississippi Railroad 175
Company, by whatsoever name the same may be called or known, or in any organization of the purchasers at the sale under said decree, or their successors or assigns, if the parties of the third part shall become such purchasers or control such purchase.

2. "Said party hereto, of the first part, hereby agrees and covenants on its part, that it hereby doth assent to the plan agreed upon and submitted by the said parties of the third part under date of January 20th, 1876, for the sale and purchase of the railroad property and franchises of the said party of the second part, under the terms and provisions herein contained, and will bring in said coupons, or so many thereof as it now has control of, for conversion into preferred stock under the terms of said plan; and it will from time to time as such conversion is perfected, cancel and surrender an equal amount, at their face value, of the promissory notes, or of 176
the other coupons (in excess of the said amount of $183,700.55) of the said party of the second part now held by the said party of the first part, or under its control: and when the entire amount of said $183,700.55 of said coupons shall have been so converted, the said party of the first part will absolutely cancel and surrender all remaining notes and coupons of said party of the second part now held or controlled by the said party of the first part."

It is, however, expressly understood and agreed that the said party of the first part shall not receive or be entitled to receive the preferred stock of the proposed new organization or such other forms of security as may represent the first mortgage bonds of said party of the second part to any greater amount than will represent so many of said coupons as shall be equal at their face value to promissory notes of the said party of the second part now held by 177
the said party of the first part or its assigns actually canceled and surrendered as provided for in this second clause of this agreement, the amount of such coupons recognized and admitted in the first paragraph being equal to the amount of such promissory notes as now outstanding.

3. The rights of the said party of the first part under the deed of indenture from the said party of the second part bearing date the first day of January, A. D. 1872, whereby said party of the

second part conveyed to the said party of the first part, all the equal undivided one-half part of the all and singular that part or portion of the railroad of said party of the second part and known as the Lake Superior and Mississippi Railroad, which extends from the point of connection thereof with the Northern Pacific Railroad near the town of Thomson in Carlton county, in the state of Minnesota, to a point within the said city of Duluth where the said Lake Supe-
178 rior and Mississippi Railroad intersects the center line of Lake Avenue in said city, being a distance of twenty-six miles, more or less, including the road-bed of said thereby granted portion of said railroad and the superstructure and tracks thereon, and the tracks, bridges, viaducts, fences and other structures and all lands, buildings and premises used or held for use for depot or station purposes in connection with such portion of said railroad, including the passenger depot within the said city of Duluth, except as therein excepted, and also the rights and privileges to lay down suitable and proper railroad side tracks and switches over and upon the unoccupied portions of certain lots and parcels of land in said city of Duluth, in said indenture, particularly specified and described; and to use the same so far and to the full extent that may be necessary to
179 give the said party of the first part free ingress and egress for its traffic to its docks and property upon Lake Superior; and also the right, privilege and easement to run any and all grain trains carrying traffic for the said party of the first part, to and from the grain elevator on Minnesota Point in Duluth aforesaid, so that the said party of the first part may have, equally with the said party of the second part, the use of the tracks laid and to be laid, of the said Lake Superior and Mississippi Railroad which extends from the center of Lake Avenue aforesaid, to the grain elevator aforesaid, for the purpose of delivering and receiving grain, but for no other purpose. Also the further right and privilege of laying down a railroad and railroad tracks over and upon so much of the lands acquired or appropriated by the said party of the second part for the right of way of its said railroad, as lies between the center line of Lake Avenue aforesaid and the eastern shores of Minnesota
180 Point aforesaid, and as constitutes a strip of land sixty feet in width, and bounded southerly by the southwesterly boundary line of the land so acquired or appropriated for such right of way; together with the right, privilege and easement of running trains over said tracks so laid or to be laid down: but such right to use the tracks so laid down shall be common to both parties so far as their respective traffic shall require; which said deed of indenture was recorded in the office of the Register of Deeds in the County of St. Louis on the 26th day of February, 1872, in Book "H" of Deeds,

on pages 226 to 232 inclusive, in and of the county of Carlton, on the 27th day of February, 1872, in Book "A" of Deeds, on pages 374 to 382 inclusive, and to which for greater certainty and more full description reference is hereby made: which said conveyance was acquiesced in and approved by the then trustees of the said first mortgage, of whom the plaintiffs in the said foreclosure are the successors, are hereby recognized, ratified, confirmed and established. And it is further hereby recognized, confirmed, established and 181
agreed that under and resulting from the operations of said certain other agreements between said parties of the first and second part, the said party of the first part hath in effect paid on the principal of the purchase money provided to be paid under the provisions of said deed, and of a contemporaneous agreement, to the said party of the second part, the sum of one hundred thousand dollars, by a credit to which the said party of the first part was entitled under terms of a certain other agreement, made April 21st, 1874, hereinafter more fully referred to, as now liquidated and adjusted by this agreement, said credit of one hundred thousand dollars being hereby taken, liquidated and adjusted as full payment of the half cost of the canal and harbor improvement provided to be paid in said agreement of April 21st, 1874, by the said party of the second part to the said party of the first part: which said last mentioned agreement 182
so far as it relates to the payment by said party of the second part to the said party of the first part, of one-half the cost of said canal and harbor improvement, it is by the application of said credit as aforesaid, to be treated herein as if absolutely performed and accomplished.

4. The purchase price of the property, premises and privileges referred to in the next preceding clause (3) of this agreement under said deed of January 1st, 1872, and therein limited at five hundred thousand dollars, to be paid as therein provided, it is hereby covenanted and agreed, and is now reduced by the allowance of said credit of one hundred thousand dollars, in full payment of the half cost of the said canal and harbor improvement as above mentioned provided to be paid in the said agreement of April 21st, 1874, a quarter at the time of the execution of the said agreement, and the other quarter when the said party of the first part should vacate certain 183
dock property therein mentioned, now taken and acknowledged by the said party of the first part, by the application of the credit aforesaid, as fully and entirely paid by the said party of the second part, in reduction by that amount of the said price or sum of five hundred thousand dollars.

And it is further covenanted and agreed that the remainder of said purchase price, namely, four hundred thousand dollars ($400,-

000), shall bear interest at the rate of seven per centum per annum from the first day of August, A. D. 1876, until paid; that the same, both principal and interest, shall, at the option of the said party of the first part, be payable in the first mortgage bonds and coupons by the said party of the second part at par, or, after reorganization as aforesaid, in preferred stock or such other form of security or issue as shall replace and represent said first mortgage bonds and
184 coupons in such reorganization, at par.

The principal of said remaining portion of said purchase price, four hundred thousand dollars, shall be due and payable on or before the first day of January, A. D. one thousand eight hundred and ninety-seven, or, at the option of said party of the first part, said payment may be anticipated in whole or in part, as said party of the first part may deem desirable.

5. The deed of indenture from the said party of the second part to the said party of the first part, bearing date April 13th, 1874, and recorded at the office of the Register of Deeds for the County of St. Louis, State of Minnesota, on the fourth day of June, A. D. 1874, in Book "K" of Deeds, pages 415–419, conveying to the said party of the first part certain tracts or parcels of land and premises situate in the city of Duluth, County and State last aforesaid, in
185 said deed more particularly described, together with the rights, easements and privileges belonging and appertaining thereto and the rights of way, and all other rights, privileges and easements, therein mentioned in which said deed the then trustees of the said first mortgage joined, thereby releasing the lands, premises, property, rights, and easements therein mentioned from the operation and effect of said mortgage, is hereby, in all things ratified, approved and confirmed.

6. This indenture of agreement dated April 21st, 1874, made in duplicate by and between the said parties of the first and second parts, recorded in the office of the Secretary of State of Minnesota, May 8th, 1874, and in the office of the Register of Deeds of said County of St. Louis, May 18th, 1874, in Book "K" of Deeds, pages 394–402, inclusive, wherein were made certain mutual covenants and agreements for and in respect to the transportation of freight
186 and the charges therefor, when passing from one to the other of the respective railroads of the parties of the first and second parts, and certain rights, property, privileges and easements were granted and covenanted to said party of the first part, and certain covenants were made for the payment by the said party of the second part to the said party of the first part for, and in respect to certain improvements therein mentioned, and which said indenture was also acquiesced and approved of by said trustees under said mortgage,

is also herein and hereby confirmed, ratified and established, so far as not superseded by the terms of this present agreement.

7. The four several agreements herein referred to, between the said parties of the first and second part, and other such agreements as are hereto annexed, except so far as modified or superseded by this present agreement, and to the same extent as the same are, or now may be, binding and operative, are hereby ratified and confirmed and established, and it is mutually covenanted and agreed 187
that the same shall be carried out, secured and performed, so far as applicable, and are to be unaffected by the said foreclosure proceedings, or the reorganization contemplated to be accomplished by said parties of the third part.

8. The parties of the third part, if they shall become the purchasers, or control the purchase, at the sale to be made under the decree of said court, in said foreclosure proceedings, their successors and assigns are to be bound by the terms and provisions of this agreement, and said sale is to be made subject hereto, and to all things herein contained, or referred to on the part of the said party of the second part, to be done, paid and performed. And in order to the carrying out and securing the performance of the several provisions of this agreement, and for the purpose of fully and finally adjusting and settling the equities between the several par- 188
ties to this agreement, the draft or decree hereto annexed marked schedule "A" is hereby agreed by and between said parties as the decree to be applied for, and submitted to the court, in said foreclosure proceedings.

In Testimony Whereof, the parties hereto of the first and second parts have hereunto set their corporate seals, duly attested and the parties of the third part their respective hands and seals the day and year hereinbefore first written.

Northern Pacific Railroad Company,

[Corporate Seal.] By C. P. WRIGHT,
President.

Attest: Sam'l Wilkeson, Secretary N. P. R. R. Co.,

Lake Superior and Mississippi
Railroad Company,

[Corporate Seal.] By JOHN P. ILSLEY, 189
President.

Attest: Thos. M. Davis, Secretary Lake Superior and Mississippi Railroad Company.

W. H. RHAWN, [L. S.]
EDWIN M. LEWIS, [L. S.]
Committee of Bondholders, NATHAN HILLES, [L. S.]
J. H. Dingee, Jr. F. R. SHELTON, [L. S.]

GEO. WHITNEY, [L. S.]
E. A. ROLLINS, [L. S.]
FISHER A. BAKER, [L. S.]

We the undersigned trustees under the first mortgage or deed of trust made by the Lake Superior and Mississippi Railroad Company bearing date January 1st, A. D. 1869, hereby acknowledge that we have received notice of the foregoing agreement, and do hereby
190 certify that in our judgment it will be to the best interests of the holders of the bonds secured by said mortgage that the settlement therein contained and referred to should be approved and confirmed by the court.

STEPHEN A CALDWELL. [Seal.]
GEORGE PHILLER. [Seal.]

Witness:
Jos. McMorns, Jr.,
Witness:
Kenton Warne.

(Endorsed.) Bill of Complaint. Filed Sept. 3, 1897.
HENRY D. LANG, Clerk.
THOS. H. PRESSNELL, Deputy.

191 UNITED STATES OF AMERICA,
ss.
District of Minnesota.

I hereby certify and return that I served the annexed Chancery subpoena on the therein named defendant Northern Pacific Railway Company by handing to and leaving a true and correct copy thereof with C. W. Bunn, General Counsel of said Ry. Co., personally at Saint Paul in said District on the 15th day of September, A. D. 1897.

R. T. O'CONNOR,
U. S. Marshal.
By T. J. SHEEHAN, Deputy.

UNITED STATES OF AMERICA.
DISTRICT OF MINNESOTA.

192 Fifth Division.

The President of the United States of America:

To The Northern Pacific Railroad Company, a corporation, and the Northern Pacific Railway Company, a corporation, greeting:

You are hereby commanded to be and appear at Rules, to be held at the office of the clerk of the Circuit Court of the United States, for the District of Minnesota, on the first Monday of October

next, at the city of Duluth, then and there to answer the Bill of Complaint of The United States of America, filed against you on the 3rd day of September, A. D. 1897; hence fail not.

WITNESS, the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, the 3rd day of September, 1897.

Seal U. S. Circuit Court, 5th Division.

Issued at my office in the city of Duluth, under the seal of said Circuit Court, the day and year last aforesaid. 193

HENRY D. LANG, Clerk.
By THOS. H. PRESSNELL, Deputy.

Memorandum: The above named defendants to enter their appearance in this suit in the clerk's office aforesaid, on or before the day at which this writ is returnable; otherwise the bill may be taken pro confesso.

HENRY D. LANG, Clerk.
By THOS. H. PRESSNELL, Deputy.

Joseph McKenna and E. C. Stringer,
Complainant's Solicitors.

(Endorsed) Chancery Subpoena—
Returnable October Rules, 1897.
Returned into the Clerk's Office and filed this 4th day of February, A. D. 1898. 194
JOSEPH McKENNA and E. C. STRINGER,
Complainant's Solicitors.

Service accepted for Northern Pacific Railway Company, September 15, 1897, at St. Paul.

C. W. BUNN,
Gen'l Counsel N. P. Ry CO.

United States Circuit Court for the District of Minnesota.

Fifth Division.

THE UNITED STATES OF AMERICA,

Complainant.

vs.

THE NORTHERN PACIFIC RAILROAD COMPANY, a corporation, and THE NORTHERN PACIFIC RAILWAY COMPANY, a corporation, 195

Defendants.

Please enter my appearance as solicitor for the above named defendants, the Northern Pacific Railroad Company and the Northern Pacific Railway Company.

JAMES B KERR.

To Thos. H. Pressnell, Deputy Clerk of the United States Circuit Court for the District of Minnesota—Fifth Division.

Dated October 2nd, 1897.

(Endorsed) Appearance.

Filed Oct. 4th, 1897.

HENRY D. LANG, Clerk.

By THOS. H. PRESSNELL, Deputy.

196

CIRCUIT COURT OF THE UNITED STATES,
FOR THE DISTRICT OF MINNESOTA.

Fifth Division.

THE UNITED STATES OF AMERICA,

Complainant.

vs.

THE NORTHERN PACIFIC RAILROAD COMPANY, a corporation: THE NORTHERN PACIFIC RAILWAY COMPANY, a corporation, and EDWIN H. McHENRY and FRANK G. BIGELOW as Receivers of THE NORTHERN PACIFIC RAILROAD COMPANY,

Defendants.

197

Please enter my appearance as solicitor for the defendants, Edwin H. McHenry and Frank G. Bigelow, as receivers of the Northern Pacific Railroad Company, in the above entitled case.

Yours truly,

JAMES B. KERR.

To Henry D. Lang, Clerk of the United States Circuit Court for the District of Minnesota—Fifth Division.

(Endorsed) Appearance of James B. Kerr for defendants.

Filed Nov. 30th, 1897.

HENRY D. LANG, Clerk.

By THOS. H. PRESSNELL, Deputy.

CIRCUIT COURT OF THE UNITED STATES,

198 FOR THE DISTRICT OF MINNESOTA.

Fifth Division.

THE UNITED STATES OF AMERICA,

Complainant.

vs.

THE NORTHERN PACIFIC RAILROAD COMPANY, a corporation: THE NORTHERN PACIFIC RAILWAY COMPANY,

a corporation, and EDWIN H. McHENRY and FRANK G. BIGELOW as Receivers of THE NORTHERN PACIFIC RAILWAY COMPANY,

Defendants.

THE DISCLAIMER OF THE DEFENDANT, THE NORTHERN PACIFIC RAILWAY COMPANY, TO THE BILL OF COMPLAINT OF THE COMPLAINANT THE UNITED STATES OF AMERICA.

199

This defendant saving and reserving to itself any and all advantages that might be taken by exception to said bill, saith: that it does not claim or pretend, and never did pretend or claim, to have any right, title, or interest, of, in or to the estates and premises described as lot five (5), of section twenty-nine (29), township fifty-four (54) north, of range thirteen (13) west, in the county of St. Louis and state of Minnesota, in the said complainants bill set forth, or any part thereof, and this defendant does disclaim any right, title or interest in said estate and premises to-wit: the said lot five (5) of section twenty-nine (29) township fifty-four (54) north, of range thirteen (13) west, in the county of St. Louis and State of Minnesota, in said complainant's bill mentioned, and every part thereof.

WHEREFORE this defendant prays that the said bill be dismissed with costs. 200

THE NORTHERN PACIFIC RAILWAY COMPANY.
By W. H. GEMMELL, Assistant Secretary.
JAMES B. KERR, Solicitor for Defendant
Northern Pacific Railway Company.

(Endorsed) Disclaimer.
Filed Nov. 30th, 1897.
HENRY D. LANG, Clerk.
By THOS. H. PRESSNELL, Deputy.

CIRCUIT COURT OF THE UNITED STATES,
FOR THE DISTRICT OF MINNESOTA.
Third Division.

THE UNITED STATES OF AMERICA,

Complainant. 201

vs.

THE NORTHERN PACIFIC RAILROAD COMPANY, a corporation: THE NORTHERN PACIFIC RAILWAY COMPANY, a corporation, and EDWIN H. McHENRY and FRANK G. BIGELOW as Receivers of THE NORTHERN PACIFIC RAILROAD COMPANY,

Defendants.

ORDER OF COURT.

It appearing to the satisfaction of the Court that Eugene G. Hay has heretofore, to-wit, on April 29th, 1898, been appointed by the Hon. Attorney General of the United States as a special Assistant to the Attorney of the United States for the District of Minnesota to aid in the preparation and prosecution of the case of the United States vs. The Northern Pacific Railroad Company,

202 It is hereby

ORDERED

That the said Eugene G. Hay be and he is hereby substituted for E. C. Stringer as the solicitor of record for the complainant in said case.

By the Court,
WM. LOCHREN,
Judge.

Dated August 1, 1898.
(Endorsed) Order of Court.
Filed Aug. 2nd, 1898.
HENRY D. LANG, Clerk.
203 By LOUISE B. TROTT, Deputy.

CIRCUIT COURT OF THE UNITED STATES.

FOR THE DISTRICT OF MINNESOTA.

THE UNITED STATES OF AMERICA,

Complainant.

vs.

THE NORTHERN PACIFIC RAILROAD COMPANY, a corporation: EDWIN H. McHENRY and FRANK G. BIGELOW, as Receivers of THE NORTHERN PACIFIC RAILROAD COMPANY and the NORTHERN PACIFIC RAILWAY COMPANY,

Defendants.

204

STIPULATION.

The joint and several answer of the defendants, the Northern Pacific Railroad Company and Edwin H. McHenry and Frank G. Bigelow as receivers of the Northern Pacific Railroad Company, having been amended pursuant to an order entered herein on the 1st day of November, 1898, it is hereby stipulated and agreed that the replication of the complainant to the original answer, which

said replication was filed herein on the 2nd day of August, 1898, shall stand as the replication to the said amended answer.

EUGENE G. HAY,
Solicitor for Complainant.

JAMES B. KERR and C. W. BUNN, Solicitors for Defendants, Northern Pacific Railroad Company, and EDWIN H. McHENRY and FRANK G. BIGELOW as Receivers of the Northern Pacific Railroad Company. 205

(Endorsed) Stipulation regarding replication.
Filed November 3rd, 1898.
HENRY D. LANG, Clerk.

IN THE CIRCUIT COURT OF THE UNITED STATES,
FOR THE DISTRICT OF MINNESOTA.

Third Division.

THE UNITED STATES OF AMERICA,
Complainant.

vs.

THE NORTHERN PACIFIC RAILROAD COMPANY, a corporation: THE NORTHERN PACIFIC RAILWAY COMPANY, a corporation, and EDWIN H. McHENRY and FRANK G. BIGELOW, 206
Defendants.

Replication of complainant in the above entitled cause to the joint and several answers of the Northern Pacific Railroad Company, Edwin H. McHenry and Frank G. Bigelow, as receivers of the Northern Pacific Railroad Company.

This repliant saving and reserving all advantages of exception to the manifold insufficiency of said answer for replication thereto saith, that it will aver and prove its said bill to be true and sufficient and that said answer is untrue and insufficient.

WHEREFORE, complainant prays relief as in said bill set forth.

ROBERT G. EVANS,
United States Attorney.
EUGENE G. HAY, 207
Special Assistant U. S. Atty.
Solicitor for Complainant.

(Endorsed) Replication.
Filed Aug. 2nd, 1898.
HENRY D. LANG, Clerk.
By LOUISE B. TROTT, Deputy.

CIRCUIT COURT OF THE UNITED STATES,
FOR THE DISTRICT OF MINNESOTA.

THE UNITED STATES OF AMERICA,

Complainant.

vs.

NORTHERN PACIFIC RAILROAD COMPANY, a corporation, EDWIN H. McHENRY and FRANK G. BIGELOW, as Re-
208 ceivers of the NORTHERN PACIFIC RAILROAD COMPANY, and the NORTHERN PACIFIC RAILWAY COMPANY,

Defendants.

STIPULATION.

The original bill of complaint filed herein, having been several times amended and an order having been entered herein on the 2nd day of August, 1898, that the complainant might file a fair copy of said bill as amended; and said amended bill having been duly filed in pursuance of the said order, it is hereby stipulated that the joint and several answer of the Northern Pacific Railroad Company and of Edwin H. McHenry and Frank G. Bigelow, as receivers of the said Northern Pacific Railroad Company, as amended pursuant to the order of the Court entered herein on the 1st day of November,
209 1898, shall stand as the answer to said amended bill of complaint.

EUGENE G. HAY,

Solicitor for Complainant.

C. W. BUNN and JAMES B. KERR, Solicitors for Defendants, Northern Pacific Railroad Company, and EDWIN H. McHENRY and FRANK G. BIGELOW, as Receivers of the Northern Pacific Railroad Company.

(Endorsed) Stipulation regarding amended answer.
Filed November 3rd, 1898.
HENRY D. LANG, Clerk.

CIRCUIT COURT OF THE UNITED STATES,
FOR THE DISTRICT OF MINNESOTA.

210 UNITED STATES OF AMERICA,

Complainant.

vs.

NORTHERN PACIFIC RAILROAD COMPANY, a corporation: EDWIN H. McHENRY and FRANK G. BIGELOW as Receivers of THE NORTHERN PACIFIC RAILROAD COMPANY and THE NORTHERN PACIFIC RAILWAY COMPANY,

Defendants.

STIPULATION.

It is hereby stipulated and agreed by and between the parties to this cause, by their respective solicitors, that the defendants may be allowed to amend their answer filed herein and that an order may be made by the Court allowing such amendment by adding at the end of paragraph XV. of the said answer on file herein, the following:

"which said act is in words and figures following, to-wit:— 211

'Section 1. The consent of the state of Wisconsin is hereby given to the Northern Pacific Railroad Company, incorporated by an act of Congress entitled 'An Act granting lands to aid in the construction of a railroad and telegraph line from Lake Superior to Puget Sound, on the Pacific Coast by the northern route,' approved July 2d, 1864, to survey, lay out, locate, construct, finish, maintain and enjoy a continuous railroad and telegraph line, with the appurtenances, within its limits, on the line within the said act of congress indicated and authorized: and for the purposes aforesaid, and in said act of congress set forth, and in order to carry the same into full effect, the said Northern Pacific Railroad Company, its successors and assigns, are hereby vested with all the rights, powers, privileges and immunities within the limits of this state which are by said act of congress conferred upon them within the territories 212 and jurisdiction of the United States: Provided, That said Northern Pacific Railroad Company shall be prohibited at any time prior to the actual building or equipment of said railroad from allowing any railroad company chartered by the laws of the state of Minnesota, to use or enjoy any of the privileges hereby granted to the Northern Pacific Railroad Company, to be exercised in the state of Wisconsin; And Provided, further, That nothing herein contained shall be construed to prevent the said Northern Pacific Railroad Company after the building and equipment of said road through the state of Wisconsin, from making such contracts for connections with Minnesota railroads, in the state of Wisconsin, (as) they may deem proper.

Section 2. This act shall take effect and be in force from and after its passage and publication."

That thereafter the legislature of the state of Wisconsin passed an act duly approved on the 10th day of May, 1870, entitled "An Act 213 to amend chapter 485 of the private and local laws of Wisconsin, entitled an act to authorize the Northern Pacific Railroad and Telegraph Company, incorporated by an act of congress entitled an act granting lands to aid in the construction of a railroad and telegraph line from Lake Superior to Puget's Sound on the Pacific Coast, by the northern route, approved July 2, 1864, to construct

their railroad and telegraph line through the state of Wisconsin, approved April 10, 1865, being chapter 253 of the private and local laws of Wisconsin for the year 1870, which act is in the words and figures following, to-wit:

'Section 1. Chapter 485 of the private and local laws of 1865 is hereby amended by adding to the end of the first section thereof the following, to-wit: and provided, further, that it shall not be
214 lawful for the said Northern Pacific Railroad Company to bring the line of its road from Minnesota into Wisconsin, nor from Wisconsin into Minnesota by crossing in any manner, whether by bridge, ferry or otherwise, the entry of the bay of Superior between Minnesota Point in the state of Minnesota, and Wisconsin Point in the state of Wisconsin, nor to construct or operate any railroad on or along the said Wisconsin Point for the purpose of a connection by that route with its own or any other railroad that may be constructed on or along said Minnesota Point. And the consent heretofore given is upon the express condition and understanding that at any time before the said Northern Pacific Railroad Company shall construct and operate to some point in Wisconsin on the west shore of the Bay of Superior, a line of railroad continuous of and connecting with its main line in Minnesota by a route intersecting the west-
215 ern boundary of Wisconsin between the Nemadji and the St. Louis rivers, and running all the way in the latter state between said rivers, it shall permit any other railroad which may be constructed from the west shore of the Bay of Superior in Wisconsin to any point on the line of the said Northern Pacific Railroad, whether in Wisconsin or in Minnesota, to make a connection with the said Northern Pacific Railroad on such terms and conditions as shall afford as good advantages and facilities in the respect of charges and dispatch, and in all other respects for the transportation of freight and passengers, between the eastern terminus aforesaid of the said other railroad and all points on the said Northern Pacific Railroad as shall be enjoyed for the transportation of freight and passengers between the Minnesota shore of the Bay of Superior, or of St. Louis Bay or of Lake Superior, and all points on the said Northern Pacific Railroad, whether over the latter road or any other rail-
216 road with which it may have connections, or both. And the legislature may at any time hereafter pass such laws and authorize such proceedings as may be necessary to enforce the observance of any provision or condition of this act according to its spirit and intent.

Section 2. This act shall take effect and be in force from and after its passage."

That thereafter the legislature of the state of Wisconsin passed

an act, duly approved on the 25th day of March, 1872, entitled "An Act to amend chapter 485, private and local laws of 1865, and chapter 253, private and local laws of 1870, and to prescribe further conditions upon which the Northern Pacific Railroad Company may construct and operate its railroad and telegraph line in this state," being chapter 139 of the private and local laws of Wisconsin for the year 1872, which act is in words and figures following, to-wit:

'Section 1. Any consent heretofore given by the legislature of 217
this state to the Northern Pacific Railroad Company to construct, operate and maintain a railroad and telegraph line in the state of Wisconsin, is hereby made subject to the further conditions, that the said Northern Pacific Railroad Company shall construct and forever maintain and operate to some point on the southwesterly shore of the Bay of Superior, between the Nemadji river and Connor's Point, a line of railroad, connecting with and continuous of the main line of said Northern Pacific Railroad, by a route running south of St. Louis river from the junction of said Northern Pacific Railroad with the Lake Superior and Mississippi Railroad intersecting the western boundary of Wisconsin at some point between the St. Louis and Nemadji rivers, and also shall construct and forever maintain, at some place where said railroad shall touch the said Bay of Superior, between the said Nemadji river and Connor's 218
Point, sufficient docks or piers, suitable and convenient for the transfer of passengers and freight from its cars on said road to Lake-going craft, and from said craft to said cars, and also shall establish and forever maintain at some place between the said Nemadji river and Connor's Point, a sufficient depot for the accommodation of passengers. And until the said Northern Pacific Railroad Company shall construct and operate such railroad to the southwesterly shore of the Bay of Superior as aforesaid, and shall so construct said docks or piers and the said depot, it shall not be lawful for the said company to construct or maintain or operate any other railroad in Wisconsin: provided, that the provisions of this section shall not apply to any road within the boundaries of Pierce or Saint Croix (County).

Section 2. Any purchase by the Northern Pacific Railroad 219
Company of, or the consolidation of its line with any other railroad whose line shall conform to the route above prescribed, shall, for the purpose of this act, be deemed equivalent to a construction by said Northern Pacific Railroad Company of its said railroad for such distance as the road so purchased or consolidated with shall be constructed on said route.

Section 3. The said Northern Pacific Railroad Company is hereby forever prohibited from constructing, maintaining or operating any railroad or railroad bridge, or bridge of any kind, across the Bay of Superior, between Minnesota Point and the shores opposite of the same.

Section 4. The said Northern Pacific Railroad Company shall be governed by the provisions of the general railroad law of this
220 state in respect to the width of roadway and acquiring title to lands.

Section 5. The foregoing limitations upon the powers of the Northern Pacific Railroad Company are hereby declared to be conditions of any consent given by this state to said company to construct a railroad or telegraph line in this state.

Section 6. This act shall take effect from and after its passage."

II.

It is further stipulated that the said defendants may be allowed to amend, and an order may be entered by this court allowing such amendment, by striking out at the end of paragraph XXVI. of said answer, from the last line of said paragraph, the words, "21st day of November, A. D. 1871" and inserting instead thereof, the words,
221 "6th day of July, A. D. 1882."

EUGENE G. HAY,
Solicitor for Complainant.
JAMES B. KERR and C. W. BUNN,
Solicitors for Defendants.

(Endorsed) Stipulation to amend answer of defendants.
Filed November 1st, 1898.
HENRY D. LANG, Clerk.
By LOUISE B. TROTT, Deputy.

CIRCUIT COURT OF THE UNITED STATES,
FOR THE DISTRICT OF MINNESOTA.

UNITED STATES OF AMERICA,
Complainant.
vs.
222 NORTHERN PACIFIC RAILROAD COMPANY, a corporation, EDWIN H. McHENRY and FRANK G. BIGELOW, as Receivers of THE NORTHERN PACIFIC RAILROAD COMPANY, and THE NORTHERN PACIFIC RAILWAY COMPANY,
Defendants.

ORDER.

Upon stipulation of the parties hereto, it is
ORDERED That the joint and several answer of the defendants

Edwin H. McHenry and Frank G. Bigelow, as receivers of the Northern Pacific Railroad Company, be and the same is hereby, amended by inserting at the end of paragraph XV. of said answer on file herein, the following:

"which said act is in the words and figures following, to-wit:

'Section 1. The consent of the state of Wisconsin is hereby given to the Northern Pacific Railroad Company, incorporated by an act of congress entitled 'An act granting lands to aid in the 223
construction of a railroad and telegraph line from Lake Superior to Puget Sound, on the Pacific Coast by the northern route,' approved July 2nd, 1864, to survey, lay out, locate, construct, furnish, maintain and enjoy a continuous railroad and telegraph line, with the appurtenances within its limits, on the line within the said act of congress indicated and authorized; and for the purposes aforesaid, and in said act of congress set forth, and in order to carry the same into full effect, the said Northern Pacific Railroad Company, its successors and assigns, are hereby vested with all the rights, powers, privileges and immunities within the limits of this state which are by said act of congress conferred upon them within the territories and jurisdiction of the United States: Provided, That said Northern Pacific Railroad Company shall be prohibited at any
time prior to the actual building or equipment of said railroad from 224
allowing any railroad company chartered by the laws of the state of Minnesota, to use or enjoy any of the privileges hereby granted to the Northern Pacific Railroad Company, to be exercised in the state of Wisconsin: And provided further, That nothing herein contained shall be construed to prevent the said Northern Pacific Railroad Company after the building and equipment of said road through the state of Wisconsin, from making such contracts for connections with Minnesota railroads, in the state of Wisconsin, (as) they may deem proper.

Section 2. This act shall take effect and be in force from and after its passage and publication."

That thereafter the legislature of the state of Wisconsin passed an act duly approved on the 10th day of May, 1870, entitled "An act to amend chapter 485 of the private and local laws of Wisconsin, 225
entitled an act to authorize the Northern Pacific Railroad and Telegraph Company, incorporated by an act of congress entitled an act granting lands to aid in the construction of a railroad and telegraph line from Lake Superior to Puget's Sound on the Pacific Coast, by the northern route, approved July 2, 1864, to construct their railroad and telegraph line through the state of Wisconsin, approved April 10, 1865, being chapter 253 of the private and local

laws of Wisconsin for the year 1870, which act is in the words and figures following, to-wit:—

'Section 1. Chapter 485 of the private and local laws of 1865 is hereby amended by adding to the end of the first section thereof the following, to-wit: and provided, further, that it shall not be lawful for the said Northern Pacific Railroad Company to bring the line of its road from Minnesota into Wisconsin nor from Wisconsin
226 into Minnesota by crossing in any manner, whether by bridge, ferry or otherwise the entry of the Bay of Superior between Minnesota Point in the state of Minnesota, and Wisconsin Point in the state of Wisconsin, nor to construct or operate any railroad on or along the said Wisconsin Point for the purpose of connecting by that route with its own or any other railroad that may be constructed on or along said Minnesota Point. And the consent heretofore given is upon the express condition and understanding that at any time before the said Northern Pacific Railroad Company shall construct and operate to some point in Wisconsin on the west shore of the Bay of Superior a line of railroad continuous of and connecting with its main line in Minnesota by a route intersecting the western boundary of Wisconsin between the Nemadji and the St. Louis rivers, and running all the way in the latter state between said
227 rivers, it shall permit any other railroad which may be constructed from the west shore of the Bay of Superior in Wisconsin to any point on the line of the said Northern Pacific Railroad, whether in Wisconsin or Minnesota, to make a connection with the said Northern Pacific Railroad on such terms and conditions as shall afford as good advantages and facilities in the respect of charges and dispatch, and in all other respects for the transportation of freight and passengers, between the eastern terminus aforesaid of the said other railroad and all points on the said Northern Pacific Railroad as shall be enjoyed for the transportation of freight and passengers between the Minnesota shore of the Bay of Superior, or of St. Louis Bay or Lake Superior, and all points on the said Northern Pacific Railroad, whether over the latter road or any other railroad with which it may have connections, or both. And the legislature may at any time hereafter pass such laws and authorize such proceed-
228 ings as may be necessary to enforce the observance of any provision or condition of this act according to its spirit and intent.

Section 2. This act shall take effect and be in force from and after its passage."

That thereafter the legislature of the state of Wisconsin passed an act, duly approved on the 25th day of March, 1872, entitled, "An act to amend chapter 485, private and local laws of 1865, and chapter

253, private and local laws of 1870, and to prescribe further conditions upon which the Northern Pacific Railroad Company may construct and operate its railroad and telegraph line in this state," being chapter 139 of the private and local laws of Wisconsin for the year 1872, which act is in the words and figures following, to-wit:—

"Section 1. Any consent heretofore given by the legislature of this state to the Northern Pacific Railroad Company to construct, operate and maintain a railroad and telegraph line in the state of 229
Wisconsin, is hereby made subject to the further conditions, that the said Northern Pacific Railroad Company shall construct and forever maintain and operate to some point on the southwesterly shore of the Bay of Superior, between the Nemadji river and Connor's Point, a line of railroad, connecting with and continuous of the main line of said Northern Pacific Railroad, by a route running south of St. Louis river from the junction of said Northern Pacific Railroad with the Lake Superior and Mississippi Railroad intersecting the western boundary of Wisconsin at some point between the St. Louis and Nemadji rivers, and also shall construct and forever maintain, at some place where said railroad shall touch the said Bay of Superior, between the said Nemadji river and Connor's Point, sufficient docks or piers, suitable and convenient for the transfer of passengers and freight from its cars on said road to lake-going craft, 230
and from said craft to said cars, and also shall establish and forever maintain at some place between the said Nemadji river and Connor's Point, a sufficient depot for the accommodation of passengers. And until the said Northern Pacific Railroad Company shall construct and operate such railroad to the southwesterly shore of the Bay of Superior as aforesaid, and shall so construct said docks or piers and the said depot, it shall not be lawful for the said company to construct or maintain or operate any other railroad in Wisconsin: provided, that the provisions of this section shall not apply to any road within the boundaries of Pierce or Saint Croix (County).

Section 2. Any purchase by the Northern Pacific Railroad Company of, or the consolidation of its line with any other railroad whose line shall conform to the route above prescribed, shall, for the purpose of this act, be deemed equivalent to a construction by said Northern Pacific Railroad Company of its said railroad for 231
such distance as the road so purchased or consolidated with shall be constructed on said route.

Section 3. The said Northern Pacific Railroad Company is hereby forever prohibited from constructing, maintaining or operating any railroad or railroad bridge, or bridge of any kind, across the Bay of Superior, between Minnesota Point and the shores opposite the same.

Section 4. The said Northern Pacific Railroad Company shall be governed by the provisions of the general railroad law of this state in respect to the width of roadway and acquiring title to lands.

Section 5. The foregoing limitations upon the powers of the Northern Pacific Railroad Company are hereby declared to be conditions of any consent given by this state to said company to construct a railroad or telegraph line in this state.

232 Section 6. This act shall take effect from and after its passage.' "

It is further ordered that said answer be, and the same is hereby amended by striking out at the end of Paragraph XXVI. of said answer, from the last line of said paragraph, the words, "21st day of November, A. D. 1871," and inserting instead thereof, the words, "6th day of July, A. D. 1882."

It is ordered that said amendments be made to the said answer now on file herein, by inserting typewritten pages containing the said first amendment hereby ordered therein, and by interlining the second of said amendments.

By the Court,

WALTER H. SANBORN,

Circuit Judge.

233 Dated Nov. 1, 1898.

(Endorsed) Order amending answer.

Filed Nov. 1st, 1898.

HENRY D. LANG, Clerk.

By LOUISE B. TROTT, Deputy.

IN THE CIRCUIT COURT OF THE UNITED STATES,
IN AND FOR THE DISTRICT OF MINNESOTA.

Fifth Division.

UNITED STATES OF AMERICA,

Complainant,

vs.

THE NORTHERN PACIFIC RAILROAD COMPANY, a corporation: THE NORTHERN PACIFIC RAILWAY COMPANY, a
234 corporation, and EDWIN H. McHENRY and FRANK G. BIGELOW, as Receivers of the said NORTHERN PACIFIC RAILROAD COMPANY,

Defendants.

IN EQUITY.

The joint and several answer of the Northern Pacific Railroad Company and Edwin H. McHenry and Frank G. Bigelow, as re-

ceivers of the Northern Pacific Railroad Company, to the bill of complaint of the United States of America, complainant:

These defendants now and at all times hereafter saving and reserving to themselves, and each of them, all benefit and advantage of exception which can or may be had or taken to the many errors, uncertainties and other imperfections in the said complainant's bill of complaint contained, for answer thereunto or unto so much or such parts thereof as these defendants are advised is, or 235
may be, material or necessary for them to make answer unto, they, these defendants, severally answering, say:

I.

They admit that the defendant, the Northern Pacific Railroad Company, is, and was at all times mentioned in the said bill of complaint, a railroad corporation duly created, organized and existing under a certain act of congress, entitled, "An act granting lands to aid in the construction of a railroad and telegraph line from Lake Superior to Puget's Sound on the Pacific Coast by the northern route," approved July 2, 1864, and the acts amendatory thereof and supplemental thereto.

These defendants say that they admit that in the year 1893 the defendant, the Northern Pacific Railroad Company, was insolvent 236
and unable to pay its debts. And in said year certain suits were commenced in the circuit court of the United States for the district of Minnesota, alleging the insolvency of the Northern Pacific Railroad Company, and the inability of the said company to pay its debts: and thereafter such proceedings were duly had in said suits that Thomas F. Oaks, Henry C. Payne and Henry C. Rouse, were, by order of the said court duly appointed receivers of the said court of all and singular the Northern Pacific Railroad Company, and all the property of the said company within the jurisdiction of the said court. And that thereafter the said Thomas F. Oaks, Henry C. Payne and Henry C. Rouse duly resigned their said trusts as such receivers and their resignations were duly accepted by said court and thereafter said defendants, Edwin H. McHenry and Frank G. Bigelow, were, by order of said court, duly appointed the successors of the said Oaks, Payne and Rouse, as receivers of the said Northern 237
Pacific Railroad Company, as aforesaid, and duly qualified as such receivers, and entered upon the discharge of their duties as such receivers. That thereafter such proceedings were duly had in said suits so pending in said circuit court that said defendants McHenry and Bigelow were duly appointed by said court final receivers of the lands, estate, property and effects of said Northern Pacific Rail-

road Company remaining after the disposition of certain thereof as alleged in said bill. And the said defendants, Edwin H. McHenry and Frank G. Bigelow, were duly clothed with full power to administer and adjust said property, and maintain and defend all actions at law or suits in equity relative thereto. That thereafter, pursuant to the decree of said court, the Northern Pacific Railroad Company conveyed, by deed, to the said Edwin H. McHenry and Frank G.
238 Bigelow, as receivers, and for the purpose of their said trust, all the property then claimed by said Northern Pacific Railroad Company situated in the district of Minnesota, among which said property was the land described in said bill of complaint.

II.

And these defendants, further answering, severally say, that they admit that the said act of congress, entitled "An act granting lands to aid in the construction of a railroad and telegraph line from Lake Superior to Puget's Sound on the Pacific Coast by the northern route," approved July 2, 1864, provided, among other things, as follows:

"And said corporation is hereby authorized and empowered to
239 lay out, locate, construct, furnish, maintain and enjoy a continuous railroad and telegraph line, with the appurtenances, namely, beginning at a point on Lake Superior, in the state of Minnesota or Wisconsin; thence westerly by the most eligible railroad route, as shall be determined by said company, within the territory of the United States, on a line north of the forty-fifth degree of latitude to some point on Puget's Sound, with a branch via the valley of the Columbia river, to a point at or near Portland, in the state of Oregon, leaving the main trunk line at the most suitable place, not more than three hundred miles from its western terminus; and is hereby vested with all the powers, privileges and immunities necessary to carry into effect the purpose of this act as herein set forth."

And said act further provided that there was thereby granted to the defendant, the Northern Pacific Railroad Company, its successors and assigns, for the purpose of aiding in the construction of
240 said railroad, every alternate section of public land, not mineral, designated by odd numbers, to the amount of twenty alternate sections per mile on each side of said railroad line as said company might adopt, through the territories of the United States, and ten alternate sections per mile on each side of said railroad line whenever it should pass through any state, and whenever, on the line thereof, the United States should have full title at the time the line of said road should be definitely fixed and a plat thereof filed in

the office of the commissioner of the general land office. And whenever, prior to the definite location of said line, any of said sections, or parts of sections, should have been granted, reserved, sold or otherwise disposed of, other lands should be selected by said company in lieu thereof in alternate sections and designated by odd numbers, not more than ten miles beyond the limits of said alternate sections.

That section three of said act contained the following pro- 241
vision and provisos:

"Provided, That if said route shall be found upon the line of any other railroad route to aid in the construction of which lands have been heretofore granted by the United States, as far as the routes are upon the same general line, the amount of land heretofore granted shall be deducted from the amount granted by this act."

"Provided further, That the railroad company receiving the previous grant of land may assign their interest to said Northern Pacific Railroad Company, or may consolidate, confederate and associate with said company upon the terms named in the first section of this act."

That section six of said act provides as follows:

"Be it further enacted, That each and every grant, right and privilege herein are so made and given to and accepted by said 242
Northern Pacific Railroad Company, upon and subject to the following conditions, namely: That the said company shall commence the work on said road within two years from the approval of this act by the president and shall complete not less than fifty miles per year after the second year, and shall construct, equip, furnish and complete the whole road by the fourth day of July, Anno Domini eighteen hundred and seventy-six."

III

These defendants, further answering, severally say that by joint resolution of the senate and house of representatives of the United States, in congress assembled, approved May 7, 1866, it was, among other things, provided, by section two of said joint resolution, as follows:

"And be it further resolved, That the time for commencing and 243
completing the Northern Pacific Railroad, and all of its several sections, is extended for a term of two years."

IV.

These defendants, further answering, severally say that they admit that by act of congress of the United States, approved May 5,

1864, entitled "An act making a grant of lands to the state of Minnesota to aid in the construction of a railroad from St. Paul to Lake Superior," congress made a grant of land to the state of Minnesota for the purpose of aiding in the construction of a railroad in said state from the city of St. Paul to the head of Lake Superior, and that by said act five alternate sections per mile, on each side of said railroad on the line thereof within said state, were granted to the state
244 of Minnesota to aid in the construction of said railroad, and that the Lake Superior and Mississippi Railroad Company became the grantee of the state of Minnesota under the said act of congress; and became and was entitled to and did receive, all benefits accruing from said act of congress; and became and was the grantee of the state of Minnesota of all the lands under said act of congress granted to the state of Minnesota to aid in the construction of a railroad from St. Paul to Lake Superior.

These defendants say that they admit that the said Lake Superior and Mississippi Railroad Company was a corporation duly created under the laws of the state of Minnesota and did construct a railroad from St. Paul to Lake Superior in the aid of which the grant, by act of congress of May 5, 1864, was made, prior to the filing by the Northern Pacific Railroad Company of any map of definite
245 location, as provided in said act of congress of July 2, 1864, and did receive the benefits of said act of congress of May 5, 1864, in the construction of this road.

These defendants say that they admit that the line of road of said Lake Superior and Mississippi Railroad Company extended and was constructed from St. Paul, Minnesota, to the village of Thomson, Minnesota, and thence to the city of Duluth, which said city of Duluth is situated at a point upon the western shore of Lake Superior in the state of Minnesota, but these defendants deny that the direction of said line from St. Paul to Duluth, by way of the village of Thomson, is northeasterly, but aver that said direction is more northerly than northeasterly.

V.

These defendants, further answering, severally say that they
246 deny that on the 6th day of March, 1865, or at any time, the said Northern Pacific Railroad Company, or any one authorized so to do on its behalf, filed in the office of the commissioner of the general land office, as alleged in said bill of complaint, a plat or map on which was designated the general route of the entire line of the road of said company from Lake Superior to Puget's Sound, on which said map or plat Duluth, on said Lake Superior, was designated as the eastern initial or starting point.

VI.

These defendants, further answering, severally say that they admit that on or about the 9th day of July, 1870, a certain agreement was entered into between the Northern Pacific Railroad Company, the Lake Superior and Mississippi Railroad Company, the Lake Superior and Puget Sound Company, and the Western Land Association, substantially as alleged in the bill of complaint herein, and that Exhibit "A" attached to said bill of complaint is a substan- 247
tial copy of said agreement so executed on or about July 9, 1870.

These defendants say that they, or any of them, to the knowledge or belief of either of them, do not know and have never been informed save by said complainant's bill, and cannot set forth, as to their belief or otherwise, whether said agreement of July 9, 1870, was performed and carried out by the said respective parties thereto.

These defendants say that they deny that the map of definite location of said Northern Pacific Railroad Company, from Thomson to Fargo, Dakota Territory, was filed in the general land office on December 12, 1871: and these defendants say that said map was filed in said office on the 21st day of November, 1871.

These defendants deny that the general line of route of said Northern Pacific Railroad Company from Thomson to Duluth was upon the same general line of route as the line of route of the Lake 248
Superior and Mississippi Railroad Company, as in said bill of complaint alleged.

VII.

These defendants, further answering, severally say that they admit that on or about the 1st day of January, 1872, a certain deed of conveyance was executed by the Lake Superior and Mississippi Railroad Company and delivered to the Northern Pacific Railroad Company, which last named company was the grantee in said deed of conveyance, and that said deed so executed and delivered became and was an operative deed of conveyance of a half interest in the line of railroad of said Lake Superior and Mississippi Railroad Company from Thomson to Duluth, and that Exhibit "A-1" attached to said bill of complaint is a substantial copy of said deed of 249
conveyance.

These defendants say that they admit that on or about the 1st day of January, A. D. 1872, a certain agreement in writing was made between the Lake Superior and Mississippi Railroad Company and the Northern Pacific Railroad Company, of which Exhibit "B" attached to said bill of complaint is a substantial copy.

These defendants admit that during the operation of that por-

tion of the Lake Superior and Mississippi Railroad Company extending from Thomson to Duluth by the said Northern Pacific Railroad company the provisions of said contract of January 1, 1872, last above mentioned, were performed and carried out by the respective parties thereto.

These defendants say that they admit that on or about the 1st day of May, 1872, the said Lake Superior and Mississippi Railroad
250 Company executed and delivered to the Northern Pacific Railroad Company a certain contract of lease, of which Exhibit "B-1" attached to and made a part of the said bill of complaint is a substantial copy.

And these defendants admit that for a period of two years from the 1st day of May, 1872, said contract of lease remained in force and effect, and that during said period of two years the terms thereof were complied with by the parties thereto.

These defendants say that they admit that on or about the 9th day of August, 1876, a certain written contract was entered into between the Northern Pacific Railroad Company and the Lake Superior and Mississippi Railroad Company substantially as alleged in said bill of complaint, and that said Exhibit "C" attached to and made a part of said bill of complaint is a substantial and correct
251 copy of said written agreement of August 9, 1876.

And these defendants admit that the Northern Pacific Railroad Company operated the said line of railroad extending from Thomson Junction to Duluth, in which said railroad company acquired a half interest by said deed of conveyance of January 1, 1872, and continued to run its trains over said line of railroad for a period of about ten years, and did expend certain sums of money in the construction of docks, wharves and buildings at the city of Duluth. That these defendants, severally answering, deny that the said line of road from Thomson Junction to Duluth, constituted a part of the main line of the said Northern Pacific Railroad, and further deny that said railroad company occupied said line for more than ten years, and deny that said company or its successor, does now so occupy and use the same.

That these defendants allege that about the year 1881 the said
252 line from Thomson to Duluth was abandoned by the Northern Pacific Railroad Company and has since been unused.

VIII.

These defendants, further answering, severally say that they deny that the city of Duluth became or was, or now is, the eastern terminus or eastern initial point of the line of the said Northern

Pacific Railroad, or the grant to said Northern Pacific Railroad Company under and by said act of congress of July 2, 1864. And these defendants further deny that said eastern terminus or eastern initial point of said line of railroad has not been elsewhere than at the said city of Duluth in the said state of Minnesota.

These defendants say that they deny that lot 5 of section 29, township 54 north, of range 13 west, in the county of St. Louis and State of Minnesota, was at all times prior to the 22nd day of April, 253
1895, a part of the public domain of the United States.

IX.

That these defendants allege that said lot 5, and the whole thereof, was duly selected by the Northern Pacific Railroad Company under the provisions of said act of congress approved July 2, 1864, as indemnity in lieu of certain lands lost from the granted, or place, limits of its said grant by act of congress of July 2, 1864, by the filing of a certain selection list in the United States district land office at Duluth, October 5, 1894, and that thereafter, and on the 13th day of April, 1895, said selection was duly approved by the secretary of the interior.

That these defendants further say that they deny that said lot 5, above described, was or is situated more than ten miles east of the 254
eastern terminus, or eastern initial point of the grant made to said company by said act of congress of July 2, 1864, and deny that said lot 5 is more than ten miles distant from the line of said railroad from its point of beginning, westward to the Pacific coast, and deny that it is without the limits of the grant to said Northern Pacific Railroad Company, and these defendants admit that said lot 5 above described, is situated more than ten miles east of the city of Duluth.

That these defendants, severally answering, say that they deny that on the 22nd day of April, A. D. 1895, or at any time, the ministerial officers of the United States in derogation of the rights of the United States, and through inadvertence or mistake, conveyed by patent, the above described land to the Northern Pacific Railroad Company under the erroneous impression and mistaken belief that said tract of land was lying and being within the limits of the grant to said Northern Pacific Railroad Company. That these defendants 255
allege that on said 22nd day of April, 1895, the said tract of land was, in accordance with the approval of the said selection by the said secretary of the interior, and with a full knowledge of the facts conveyed to the Northern Pacific Railroad Company, as indemnity in lieu of lands lost from the place or granted limits of the grant to said company, and that said tract was, and is, situate within the 20-30 mile, or indemnity, limits of the said grant.

X.

And these defendants, further answering, severally say that by section 4 of said act of congress approved July 2, 1864, it was further provided that whenever said company should have twenty-five consecutive miles of any portion of said railroad and telegraph line ready for the service contemplated, the president of the United States should appoint three commissioners to examine the same, and
256 if it should appear that such twenty-five consecutive miles of said railroad and telegraph line had been completed in a good, substantial and workmanlike manner, and in all other respects as required by said act, such commissioners should so report to the president of the United States, and patents of lands as aforesaid should be issued to the said company, confirming all right and title to said lands situated opposite to and coterminous with such completed section of said road: and that whenever, from time to time, twenty-five additional consecutive miles should have been constructed, completed and in readiness as aforesaid, and verified by said commissioners to the president of the United States, then patents should be issued to said company conveying the additional sections of land as aforesaid and so on, as fast as every twenty-five miles of said road should be so completed.
257

XI.

And these defendants, further answering, severally say that by section 6 of said act of congress approved July 2, 1864, it was provided as follows:

"That the President of the United States shall cause the lands to be surveyed for forty miles in width on both sides of the entire line of said road, after the general route shall be fixed, and as fast as may be required by the construction of said railroad; and the odd sections of land hereby granted shall not be liable to sale or entry, or pre-emption before or after they are surveyed, except by said company as provided in this act; but the provisions of the act of September, 1841, granting pre-emption rights and the acts amendatory thereof, and of the act entitled "An act to secure homesteads
253 to actual settlers on the public domain," approved May 20, 1862, shall be and the same are hereby extended to all other lands on the line of said road, when surveyed, excepting those hereby granted to said company. And the reserved alternate sections shall not be sold by the government at a price less than two dollars and fifty cents per acre when offered for sale."

XII.

And these defendants further answering, severally say that by section 12 of said act of congress approved July 2, 1864, it was provided that the acceptance of the terms and conditions of said act by said Northern Pacific Railroad Company should be signified in writing, under the corporate seal of said company duly executed pursuant to the direction of its board of directors first had and obtained, which acceptance should be made within two years after the passage 259
of said act and should be served on the president of the United States within two years after the passage of said act.

That said railroad company duly accepted the terms, conditions and impositions of said act in writing, under its corporate seal, executed pursuant to the directions of its board of directors first had and obtained, and on the 29th day of December, A. D. 1864, served such acceptance on the president of the United States.

XIII.

And these defendants, further answering, severally say that by section 18 of said act of congress approved July 2, 1864, it was provided as follows:

"That said Northern Pacific Railroad Company shall obtain the consent of the Legislature of any State through which any portion 260
of said railroad line may pass, previous to commencing the construction thereof: but said company may have the right to put on engineers and survey the route before obtaining the consent of the Legislature."

XIV.

And these defendants, further answering, severally say that by a joint resolution of congress approved May 31, 1870, entitled "A resolution of congress authorizing the Northern Pacific Railroad Company to issue bonds for the construction of its road, and to secure the same by mortgage, and for other purposes," it was resolved and provided that in the event of there not being in any state or territory in which the main or branch line of said road may be located, at the time of the final location thereof, the amount of lands per mile granted by said act of congress approved July 2, 1864, 261
to said company within the limits prescribed by said act, the said company should be entitled, under the direction of the secretary of the interior, to receive as many sections of land belonging to the United States and designated by odd numbers in such state or territory within ten miles on each side of the line of said road beyond the limits prescribed in said act of congress approved July 2, 1864,

as would make up the deficiency on said main or branch line (except mineral or other lands as excepted by said act of congress approved July 2, 1864) to the amount of lands granted, sold, reserved, occupied by homestead settlers, pre-empted or otherwise disposed of subsequent to the passage of said act of congress approved July 2, 1864.

XV.

262 And these defendants further answering, severally say that pursuant to the provisions of section 18 of said act of Congress approved July 2, 1864, the said Northern Pacific Railroad Company obtained the consent, as required by said section 18, of the legislature of Wisconsin, to locate and construct and maintain its said railroad through the state of Wisconsin, which consent was conferred by an act of the legislature of the state of Wisconsin entitled "An act to authorize the Northern Pacific Railroad and Telegraph Company, incorporated by an act of congress entitled 'An act granting lands to aid in the construction of a railroad and telegraph line from Lake Superior to Puget's Sound on the Pacific coast by the northern route,' approved July 2, 1864, to construct their railroad and telegraph line through the state of Wisconsin," and the said act of the legislature of the state of Wisconsin is chapter 465 of the
263 Private and Local laws of the State of Wisconsin for the year 1865, said act being approved April 10, 1865, which said act is in the words and figures following, to-wit:

'Section 1. The consent of the state of Wisconsin is hereby given to the Northern Pacific Railroad Company, incorporated by an act of congress entitled 'An act granting lands to aid in the construction of a railroad and telegraph line from Lake Superior to Puget Sound, on the Pacific coast by the northern route,' approved July 2d, 1864, to survey, lay out, locate, construct, furnish, maintain and enjoy a continuous railroad and telegraph line, with the appurtenances, within its limits on the line within the said act of congress indicated and authorized, and for the purposes aforesaid, and in said act of congress set forth, and in order to carry the same into full effect, the said Northern Pacific Railroad Company, its successors
264 and assigns, are hereby vested with all the rights, powers, privileges and immunities within the limits of this state which are by said act of congress conferred upon them within the territories and jurisdiction of the United States: Provided, that said Northern Pacific Railroad Company shall be prohibited at any time prior to the actual building or equipment of said railroad from allowing any railroad company chartered by the laws of the state of Minnesota, to use or enjoy any of the privileges hereby granted to the Northern Pacific

Railroad Company, to be exercised in the state of Wisconsin: And provided, further, that nothing herein contained shall be construed to prevent the said Northern Pacific Railroad Company after the building and equipment of said road through the state of Wisconsin, from making such contracts for connections with Minnesota railroads, in the state of Wisconsin, (as) they may deem proper.

Section 2. This act shall take effect and be in force from and after its passage and publication.' 265

That thereafter the legislature of the state of Wisconsin passed an act duly approved on the 10th day of May, 1870, entitled 'An act to amend chapter 485 of the private and local laws of Wisconsin, entitled an act to authorize the Northern Pacific Railroad and Telegraph Company incorporated by an act of congress entitled "An act granting lands to aid in the construction of a railroad and telegraph line from Lake Superior to Puget's Sound, on the Pacific coast, by the Northern route, approved July 2, 1864, to construct their railroad and telegraph line through the state of Wisconsin, approved April 10, 1865, being chapter 253 of the private and local laws of Wisconsin for the year 1870, which act is in the words and figures following, to-wit:

'Section 1. Chapter 485 of the private and local laws of 1865 is hereby amended by adding to the end of the first section thereof the 266 following, to-wit: and provided, further, that it shall not be lawful for the said Northern Pacific Railroad Company to bring the line of its road from Minnesota into Wisconsin, nor from Wisconsin into Minnesota, by crossing in any manner, whether by bridge, ferry or otherwise, the entry of the Bay of Superior between Minnesota Point in the state of Minnesota, and Wisconsin Point in the state of Wisconsin, nor to construct or operate any railroad on or along the said Wisconsin Point for the purpose of a connection by that route with its own or any other railroad that may be constructed on or along said Minnesota Point. And the consent heretofore given is upon the express condition and understanding that at any time before the said Northern Pacific Railroad Company shall construct and operate to some point in Wisconsin on the west shore of the Bay of Superior, a line of railroad continuous of and connecting with its main line in Minnesota by a route intersecting the western boundary 267 of Wisconsin between the Nemadji and the St. Louis rivers, and running all the way in the latter state between said rivers, it shall permit any other railroad which may be constructed from the west shore of the Bay of Superior in Wisconsin to any point on the line of the said Northern Pacific Railroad, whether in Wisconsin or Minnesota, to make a connection with the said Northern Pacific

Railroad on such terms and conditions as shall afford as good advantages and facilities in the respect of charges and dispatch, and in all other respects for the transportation of freight and passengers, between the eastern terminus aforesaid of said other railroad and all points on the said Northern Pacific Railroad as shall be enjoyed for the transportation of freight and passengers between the Minnesota shore of the Bay of Superior, or of St. Louis Bay or of Lake Superior,
268 and all points on the said Northern Pacific Railroad, whether over the latter road or any other railroad with which it may have connections, or both. And the legislature may at any time hereafter pass such laws and authorize such proceedings as may be necessary to enforce the observance of any provisions or condition of this act according to its spirit and intent.

Section 2. This act shall take effect and be in force from and after its passage.'

That thereafter the legislature of the State of Wisconsin passed an act, duly approved on the 25th day of March, 1872, entitled 'An act to amend chapter 485, private and local laws of 1865, and chapter 253, private and local laws of 1870, and to prescribe further conditions upon which the Northern Pacific Railroad Company may construct and operate its railroad and telegraph line in this state,'
269 being chapter 139 of the private and local laws of Wisconsin for the year 1872, which act is in the words and figures following, to-wit:

'Section 1. Any consent heretofore given by the legislature of this state to the Northern Pacific Railroad Company to construct, operate and maintain a railroad and telegraph line in the state of Wisconsin, is hereby made subject to the further conditions, that the said Northern Pacific Railroad Company shall construct and forever maintain and operate to some point on the southwesterly shore of the Bay of Superior, between the Nemadji river and Connor's Point, a line of railroad, connecting with and continuous of the main line of said Northern Pacific Railroad, by a route running south of St. Louis river from the junction of said Northern Pacific Railroad with the Lake Superior & Mississippi Railroad intersecting the western boundary of Wisconsin at some point between the St. Louis and Ne-
270 madji rivers, and also shall construct and forever maintain, at some place where said railroad shall touch the said Bay of Superior, between the said Nemadji river and Connor's Point, sufficient docks or piers, suitable and convenient for the transfer of passengers and freight from its cars on said road to lake-going craft, and from said craft to said cars, and also shall establish and forever maintain at some place between the said Nemadji river and Connor's Point, a sufficient depot for the accommodation of passengers. And until

the said Northern Pacific Railroad Company shall construct and operate such railroad to the southwesterly shore of the Bay of Superior as aforesaid, and shall so construct said docks or piers and the said depot, it shall not be lawful for the said company to construct or maintain or operate any other railroad in Wisconsin: provided, that the provisions of this section shall not apply to any road within the boundaries of Pierce or Saint Croix (county).

Section 2. Any purchase by the Northern Pacific Railroad Com- 271
pany, of, or the consolidation of its line with any other railroad whose line shall conform to the route above prescribed, shall, for the purpose of this act, be deemed equivalent to a construction by said Northern Pacific Railroad Company of its said railroad for such distance as the road so purchased or consolidated with shall be constructed on said route.

Section 3. The said Northern Pacific Railroad Company is hereby forever prohibited from constructing, maintaining or operating any railroad or railroad bridge, or bridge of any kind, across the Bay of Superior, between Minnesota Point and the shores opposite the same.

Section 4. The said Northern Pacific Railroad Company shall be governed by the provisions of the general railroad law of this state in respect to the width of roadway and acquiring title to lands. 272

Section 5. The foregoing limitations upon the powers of the Northern Pacific Railroad Company are hereby declared to be conditions of any consent given by this state to said company to construct a railroad or telegraph line in this state.

Section 6. This act shall take effect from and after its passage.' "

XVI.

And these defendants further answering, severally say that pursuant to section 18 of said act of congress approved July 2, 1864, the said Northern Pacific Railroad Company obtained the consent of the legislature of the state of Minnesota authorizing the said company to locate, construct and maintain its railroad through the said state of Minnesota, and said consent was conferred by the legislature of the state of Minnesota by an act of said legislature, approved 273
the 2nd day of March, 1865, being chapter 69 of the special laws of Minnesota for the year 1865, entitled "An act to aid in the construction of the Northern Pacific Railroad and telegraph line from Lake Superior to Puget Sound," and it was provided in and by said act as follows:

"That the consent of the state be and the same is hereby given to the said Northern Pacific Railroad Company, to survey, lay out,

locate, construct, furnish, maintain and enjoy a continuous railroad and telegraph line, with the appurtenances within its limits, on the line in said act of congress authorized: and for the purposes aforesaid in said act of congress set forth, and in order to carry the same into full effect, the said Northern Pacific Railroad Company, its successors and assigns, are hereby vested with all the rights, powers, privileges and immunities, within the limits of this state, which are
274 by said act of congress conferred upon them within the territories and jurisdiction of the United States subject to the conditions in said act contained, and to the following proviso: Provided, that should the said company elect to make the eastern terminus of said road east of the eastern boundary of the state of Minnesota, then and in that case, they shall construct, or cause to be constructed, a line of railroad from the said main line to the navigable waters of Lake Superior, within the state of Minnesota, of the same gauge as said main line, for which purpose the same powers, rights, and privileges are hereby granted to said company as they have or may have to construct said main line within the state of Minnesota, and provided, further, that nothing in this act contained shall be construed as exempting the road-bed and other property of said company within this state from taxation."
275

XVII.

And these defendants, further answering, severally say that thereafter, and for the purpose of ascertaining the most practicable route for a railroad to be constructed under the provisions of the said act of congress of July 2, 1864, from a point on Lake Superior in Minnesota or Wisconsin to Puget's Sound, the Northern Pacific Railroad Company caused surveying and exploring parties to be put into the field during the years of 1866, 1867, 1868 and 1869, and during those years said parties, acting for said railroad company, made surveys of various lines which appeared to be practicable for railroad routes, commencing at different points on Lake Superior and extending westwardly therefrom; that said parties also explored and investigated the country north of the forty-fifth degree of latitude and west of various points on Lake Superior and from time to
276 time reported to the board of directors of said railroad company the result of such surveys and explorations; that neither the board of directors, nor the officers of said railroad company were possessed of sufficient knowledge or information to determine upon or fix a feasible route for the railroad contemplated by said act of congress of July 2, 1864, prior to the making of the surveys and explorations as above set forth.

XVIII.

And these defendants, further answering, severally say that thereafter and prior to the 13th day of August, A. D. 1870, the said Northern Pacific Railroad Company duly located the general route of the line of said railroad from the mouth of the Montreal river, a point on Lake Superior in the state of Wisconsin, westward over and across the states of Wisconsin and Minnesota to a point on the Red River of the North, on the western boundary of the state of 277
Minnesota near Fargo in the then territory of Dakota; and thereafter, and on the 13th day of August, A. D. 1870, the said Northern Pacific Railroad Company duly caused to be transmitted to the secretary of the interior a certain map or plat showing the proposed general route of its said railroad according to the said location thereof from the mouth of the Montreal river, a point on Lake Superior in the State of Wisconsin, westwardly over and across the said states of Wisconsin and Minnesota to a point on the Red River of the North near Fargo in the then territory of Dakota.

XIX.

And these defendants, further answering, severally say that thereupon the secretary of the interior, upon the receipt of said map 278
or plat showing the proposed route of said railroad as aforesaid, duly approved the same in all respects and thereupon transmitted the said map or plat to the commissioner of the general land office with instructions to the said commissioner to file the said map or plat in his office and to withdraw from sale, entry and pre-emption all the odd-numbered sections of public land, not mineral, within twenty miles of said line of general route as indicated on said map or plat. That the said commissioner of the general land office, acting under the directions of the secretary of the interior, caused said map or plat to be filed in his office on the 13th day of August, A. D. 1870, and thereupon marked and designated upon the maps and records of the general land office lines showing the limits of the lands situated within twenty miles of said line of general route as indicated upon said map or plat so filed. And thereupon the commissioner of the general land office directed the United States dis- 279
trict land officers of the various land districts in Wisconsin and Minnesota within which districts were situated any of said lands so directed to be withdrawn and withheld from sale, entry and preemption, to withdraw and withhold all odd-numbered sections of public land, not mineral, situated within the twenty miles of said line of general route as shown on said map or plat. And by the same order wherein the commissioner of the general land office

directed the said lands to be withdrawn from sale, entry and pre-emption, the said commissioner directed the said United States district land officers to increase the price of all even numbered sections of public land, alternate to those odd-numbered sections so withdrawn as aforesaid, to $2.50 per acre. That pursuant to said orders of the said commissioner of the general land office the said odd-numbered sections of land situated within twenty miles of said
280 line of general route of said railroad, so located as aforesaid, were thereafter withdrawn as directed and said even-numbered sections, alternate to said odd-numbered sections so withdrawn, were increased in price to $2.50 per acre, and by virtue of the said order, of said commissioner of the general land office, the United States sold and disposed of large quantities of land included in said even-numbered sections in the state of Wisconsin and received payment therefor at the rate of $2.50 per acre.

XX.

These defendants, further answering, severally say that thereafter the Northern Pacific Railroad Company definitely located that portion of the line of its said railroad from the village of Thomson, now Thomson Junction, in Carlton county, state of Minnesota, east
281 to a point in section fifteen (15), township forty-seven (47) north, of range two (2) west of the fourth principal meridian, Wisconsin, said section 15 being about eight miles west of the point indicated as the eastern terminus of the line of said railroad upon the said map of general route so filed as aforesaid; and on or about the 5th day of July, 1882, the said Northern Pacific Railroad Company transmitted to the secretary of the interior a certain map or plat showing the line of said definite location from said village of Thomson eastward to said point in said section 15, last mentioned, with a request that the same be transmitted to the commissioner of the general land office, for filing in his office, and for such necessary and proper action thereon as should be in compliance with the law and practice of the department of the interior. That thereupon the secretary of the interior
282 transmitted said map of definite location of said portion of said railroad to the commissioner of the general land office, who duly approved and accepted the same; and on the 6th day of July, 1882, filed said map in his office. That Exhibit "A" hereunto annexed, and which these defendants pray may be considered as a part of this answer, shows the line of definite location as shown upon said map so filed in the office of the commissioner of the general land office on July 6, 1882.

XXI.

That thereafter, and on the 22d day of November, 1882, the secretary of the interior directed the commissioner of the general land office to cause to be withdrawn from sale, homestead entry and pre-emption, all odd-numbered sections of public land coterminous with and situated within forty miles of said line of definite location, as indicated upon said map so filed as aforesaid, in so far as the railroad of said Northern Pacific Railroad Company had been 283
actually constructed upon said line of definite location: and thereupon, and on the 5th day of January, A. D. 1883, complying with the directions of the secretary of the interior, the commissioner of the general land office made an order and transmitted the same to the land office of the United States district land office at Bayfield, Wisconsin, wherein and whereby said commissioner directed the said district land officers to withhold from sale or entry and pre-emption all the odd-numbered sections of public land coterminous with and situated within forty miles of that portion of said line of definite location whereon the said Northern Pacific Railroad Company had actually constructed its railroad.

That thereafter, and on the 17th day of May, A. D. 1883, the secretary of the interior further instructed the commissioner of the gen- 284
eral land office to withhold all odd-numbered sections of public land coterminous with and situated within thirty miles of said line of definite location of said railroad as shown upon said map so filed as aforesaid, without reference to the actual construction of said railroad; and thereupon, and on the 22nd day of June, A. D. 1883, the commissioner of the general land office, complying with the directions of the secretary of the interior, made and issued an order to the United States district land officers at Bayfield, Wisconsin, that being the district within which lands in Wisconsin were situated, which were opposite to and coterminous with said line of definite location, directing said district land officers to withdraw and withhold from sale, entry and pre-emption all the odd-numbered sections of public land situated within thirty miles of said line of definite location as shown upon said map of definite location so filed as aforesaid.

285

That thereafter, and on the 8th day of October, 1883, the secretary of the interior instructed the commissioner of the general land office to withdraw and withhold from sale or entry or pre-emption all odd-numbered sections of public land coterminous with and situated within forty miles of said line of definite location as shown upon said map of definite location so filed as aforesaid; and thereafter, and on the 20th day of October, A. D. 1883, the com-

missioner of the general land office made and issued an order to the United States district land officers of the United States district land office at Bayfield, Wisconsin, that being the district within which the lands in the state of Wisconsin were situated, which were opposite to and within forty miles of said line of definite location so filed as aforesaid, wherein and whereby the said commissioner directed the said district land officers to withdraw and withhold
286 from sale all odd-numbered sections of public land situated opposite to and coterminous with and within forty miles of said line of definite location as shown upon said map of definite location so filed as aforesaid.

XXII.

These defendants, further answering, severally say that thereafter, and on the 28th day of August, A. D. 1884, the board of directors of the Northern Pacific Railroad Company duly adopted the following resolution:

"Resolved, That the eastern terminus or the point of beginning of the Northern Pacific Railroad on Lake Superior be and the same is hereby fixed, determined and established at a point at the city of Ashland, on Lake Superior, in the county of Ashland, in the state
287 of Wisconsin, in section 27, township 48 north, range 4 west of the fourth principal meridian."

And thereafter, and on or about the 3rd day of December, A. D. 1884, the said Northern Pacific Railroad Company transmitted a copy of said resolution, duly certified by its secretary, under the corporate seal of said company, to the commissioner of the general land office.

That said point at Ashland, so fixed by said resolution of the board of directors of the Northern Pacific Railroad Company as the initial point of its said railroad, is on the line of the definite location of said railroad, as shown by the map thereof filed in the office of the commissioner of the general land office on the 6th day of July, 1882, as above set forth, and said point at Ashland is situated about twelve miles west of the most easterly point indicated on said map of definite location so filed on the 6th day of July, 1882.
288

XXIII.

And these defendants, further answering, severally say that thereafter the commissioner of the general land office, in due exercise of the authority committed to him by law, considered the said resolution of the board of directors of the Northern Pacific Railroad Company, and the question of the initial point of said railroad on

Lake Superior, and ratified and confirmed the action of said board of directors and accepted and approved the designation of said point at Ashland as the initial point of said railroad on Lake Superior, and said commissioner caused to be prepared a diagram showing the final eastern terminus of said railroad at Ashland and further made and issued an order and transmitted the same on the 3rd day of February, 1887, to the United States district land officers at the district land office located at Ashland, wherein and whereby 289
the said commissioner ordered that all lands situated east of said initial point at Ashland be released from said prior withdrawals from sale, entry and pre-emption for the benefit of the Northern Pacific railroad Company.

XXIV.

And these defendants, further answering, severally say that the said Northern Pacific Railroad Company duly constructed the whole of its said line of railroad from a point on Lake Superior, in the state of Wisconsin, to-wit: the city of Ashland to Puget's Sound, on the Pacific Coast, in all respects as required by said act of congress of July 2, 1864, and the acts and joint resolutions of congress amendatory thereof, and the same was duly accepted by the president of the United States as provided in said act of congress of July 290
2, 1864.

XXV.

And these defendants, further answering, severally say that the portion of said railroad extending westward from said initial point at said city of Ashland to the said village of Thomson, in Carlton county, in the state of Minnesota, was duly constructed on said line of definite location so fixed as aforesaid, and said portion extending from Ashland to Thomson was duly examined in three sections by commissioners appointed by the president of the United States as provided in said act of congress of July 2, 1864.

That the first of said three sections so examined by said commissioners extended from the said village of Thomson, in the state of Minnesota, to a point on Bluff Creek, in the state of Wisconsin, 291
a distance of 25 miles.

That the second of said three sections so examined by said commissioners extended from said point on Bluff Creek in said state of Wisconsin, to a point on the Brule River, in said state of Wisconsin, a distance of 25 miles.

That the third of said sections so examined by said commis-

sioners extended from said point on the Brule River to a point in the city of Ashland, in said state of Wisconsin, on Lake Superior.

That said commissioners so appointed by the president of the United States to examine said three sections of constructed road duly reported as to each of said sections that the same was constructed in a good, substantial and workmanlike manner, and in all other respects as required by said act of congress of July 2, 1864.

292 That the secretary of the interior duly approved the said reports of said commissioners upon said three sections of constructed road and recommended to the president of the United States that the said three sections of railroad so constructed and examined by said commissioners aforesaid be accepted and the said reports of the said commissioners be approved.

That the president of the United States thereupon duly approved the said reports of the said commissioners and accepted the said three sections of constructed road as provided in said act of July 2, 1864.

That the said first of said three sections of constructed road extending from the village of Thomson to the city of Ashland, to-wit: that section extending from said Thomson to said Bluff Creek was duly accepted by the president of the United States and the report

293 thereon approved September 16, 1882.

That the second of said three sections, to-wit: that section extending from said Bluff Creek to said Brule river was duly accepted by the president of the United States and the report thereon approved January 31st, 1884.

That the third of said three sections, to-wit: that section extending from said Brule river to said city of Ashland was duly accepted by the president of the United States and the report thereon approved February 6th, 1885.

XXVI.

These defendants, further answering, severally say that said lot 5, in section twenty-nine (29), in township fifty-four (54) north, of range thirteen (13) west, described in the bill of complaint herein, is situated opposite to and more than twenty, but less than thirty,

294 miles distant from the second of said three sections of railroad so constructed, as aforesaid, from Thomson Junction to the city of Ashland; and the said lot 5, last above described, is situated opposite to and more than twenty, but less than thirty, miles distant from the line of the said Northern Pacific Railroad Company so definitely located, as aforesaid, by the filing of the map of definite location in the office of the commissioner of the general land office on the 6th day of July A. D. 1882.

XXVII.

And these defendants, further answering, severally say that in the month of February, A. D. 1873, the directors of the Northern Pacific Railroad Company were informed that a certain claim was made by the Lake Superior and Mississippi Railroad Company that the effect of that certain agreement mentioned in the bill of complaint herein, which was entered into between the said two companies last named on the 1st day of January, 1872, whereby the 295
said Lake Superior and Mississippi Railroad Company conveyed to the said Northern Pacific Railroad Company a half interest in that portion of its road extending from Thomson Junction to Duluth, was to fix the eastern terminus of the said Northern Pacific Railroad at Duluth. And thereupon by resolution duly adopted upon the 13th day of February, A. D. 1873, the said directors of the said Northern Pacific Railroad Company called upon the said Lake Superior and Mississippi Railroad Company for an agreement construing the said agreement of January 1, 1872, so that the same should not be held to intend or have intended to fix the eastern terminus of the Northern Pacific Railroad at Duluth. That thereafter, and on the second day of June, 1873, the said Lake Superior and Mississippi Railroad Company, by a resolution of its board of directors duly adopted on 296
that day, agreed with the said Northern Pacific Railroad Company that the said agreement of January 1, 1872, should not be held to intend or have intended that the eastern terminus of the Northern Pacific Railroad Company should be or was by virtue of the said agreement of January 1, 1872, so established at Duluth, Minnesota.

XXVIII.

And these defendants, further answering, severally say that on the 21st day of April, A. D. 1874, the said Northern Pacific Railroad Company and the said Lake Superior and Mississippi Railroad Company entered into an agreement in writing executed by the duly authorized officers of the two companies respectively, by the terms whereof the said Northern Pacific Railroad Company surrendered all rights to the said Northern Pacific Railroad Company 297
under said contract of lease of May 1, 1872, mentioned in the said bill of complaint herein, a copy whereof is attached to said bill of complaint and marked Exhibit "B-1," and thereafter by virtue of said instrument, so executed as aforesaid, releasing to the said Lake Superior and Mississippi Railroad all rights claimed by said Northern Pacific Railroad Company under and by virtue of said contract of lease of May 1, 1872, the said Northern Pacific Railroad

Company surrendered and delivered over to the said Lake Superior and Mississippi Railroad Company all the lines of railroad so leased by said contract of May 1, 1872.

XXIX.

And these defendants, further answering, severally say that they deny each and every allegation, matter and thing in said bill
298 of complaint contained not hereinbefore expressly admitted or otherwise answered unto or denied. And the said defendants, further answering, deny that the complainant is entitled to the relief, or any part thereof, in its said bill of complaint demanded, and pray the same advantage of this answer as if they had pleaded or demurred to said bill of complaint.

All of which matters and things these defendants are ready to aver and prove as this court shall direct; and pray to be dismissed with their proper costs and charges in this behalf most wrongfully assessed.

NORTHERN PACIFIC RAILROAD COMPANY, and EDWIN H. McHENRY and FRANK G. BIGELOW, as Receivers of the Northern Pacific Railroad Company, Defendants.

299 By JAMES B. KERR,
Their Solicitor.

C. W. BUNN,
Of Counsel.

UNITED STATES OF AMERICA,)
District of Minnesota, (ss.
County of Ramsey.)

C. S. Mellen, being first duly sworn, on oath says that he is an officer, to-wit: the president of the Northern Pacific Railroad Company, one of the defendants to the bill of complaint herein; and further says that he has read the foregoing answer and knows the contents thereof and that the matters therein set forth are true of his own knowledge, except those matters therein stated on information and belief, and, as to those matters, he believes the said answer
300 to be true.

C. S. MELLEN.

Subscribed and sworn to before me
this 17th day of February, 1898.

H. BRAYTON,
Notary Public,
Ramsey County, Minn.

[Notarial Seal].

UNITED STATES OF AMERICA,)
District of Minnesota, (ss.
County of Ramsey.)

Edwin H. McHenry, being first duly sworn, on oath says that he is one of the receivers of the Northern Pacific Railroad Company and a defendant to the bill of complaint herein: he further says that he has read the foregoing answer and knows the contents thereof and that the matters and things therein set forth are true of his own knowledge, except those matters therein stated on information and belief, and, as to those matters, he believes the said answer to be true. 301

EDWIN H. McHENRY.

Subscribed and sworn to before me
this 18th day of January, 1898.

R. H. JOHNSTON,
Notary Public,
Ramsey County, Minn.

[Notarial Seal].

UNITED STATES OF AMERICA,)
Eastern District of Wisconsin, (ss.
City and County of Milwaukee.)

Frank G. Bigelow, being first duly sworn, on oath says that he is one of the receivers of the Northern Pacific Railroad Company and a defendant to the bill of complaint herein: he further says that he has read the foregoing answer and knows the contents thereof and that the matters and things therein set forth are true to the best of his knowledge, information and belief. 302

FRANK G. BIGELOW.

Subscribed and sworn to before me
this 19th day of January, 1898.

H. G. GOLL,
Notary Public,
Milwaukee County, Wisconsin.

[Notarial Seal].

Here follows, EXHIBIT A, being "Map showing line of definite location of Northern Pacific Railroad Company from Thomson Junction in Minnesota to a point in Sec. 15—T. 47 N.—R. 2 W.—of 4th Principal Meridian in Wisconsin. 303

(Endorsed) Answer of defendants Northern Pacific Railroad Company and Edwin H. McHenry and Frank G. Bigelow, as receivers of the Northern Pacific Railroad Company.
Filed February 26th, 1898.
HENRY D. LANG, Clerk.

CIRCUIT COURT OF THE UNITED STATES,
FOR THE DISTRICT OF MINNESOTA.

UNITED STATES OF AMERICA,

Complainant.

vs.

THE NORTHERN PACIFIC RAILROAD COMPANY, a corporation, EDWIN H. McHENRY and FRANK G. BIGELOW, as
304 Receivers of THE NORTHERN PACIFIC RAILROAD COMPANY, and THE NORTHERN PACIFIC RAILWAY COMPANY,

Defendants.

STIPULATION.

It is hereby stipulated and agreed by and between the complainant above named, by Eugene G. Hay, Esquire, Special Assistant United States Attorney for the District of Minnesota, its solicitor, and the defendants, The Northern Pacific Railroad Company and Edwin H. McHenry and Frank G. Bigelow, as Receivers of the Northern Pacific Railroad Company, by C. W. Bunn, Esquire, and James B. Kerr, Esquire, their solicitors, that upon the final
305 hearing of this cause the following statement shall be taken to be true and that said statement, together with the allegations of the bill which are admitted by the defendants' answer, contains all of the facts bearing upon the issues involved in this cause:

I.

That by act of the Congress of the United States, of May 5, 1864, entitled, "An act making a grant of land to the State of Minnesota to aid in the construction of a railroad from St. Paul to Lake Superior," said congress made a grant of land to the state of Minnesota for the purpose of aiding in the construction of a railroad in said state from the city of St. Paul to the head of Lake Superior; that by said act five alternate sections per mile on each side of said railroad on the line thereof, within said state, were
306 granted to the state of Minnesota for the construction of said railroad; that the Lake Superior and Mississippi Railroad Company became the grantee of the state of Minnesota under said act of congress and became and was entitled to and did receive all the benefits accruing from said act of congress, and became and was the grantee of the state of Minnesota to all the lands under said act of congress granted to the state of Minnesota in aid of the construction of a railroad from St. Paul to Lake Superior.

II.

That said Lake Superior and Mississippi Railroad Company was a corporation duly created under the laws of the state of Minnesota and did construct a railroad from St. Paul to Lake Superior, in aid of which the grant under said act of congress of May 5, 1864, was made, prior to the filing by the Northern Pacific Railroad Company of any map of definite location as provided in said act of congress of July 2, 1864, and did receive the benefits of said act of 307
congress of May 5, 1864, in the construction of its road; and that the line of road of said Lake Superior and Mississippi Railroad Company extended and was constructed from St. Paul, Minnesota, northeastward to the village of Thomson and thence in a northeasterly direction to the city of Duluth, which said city of Duluth is situated at a point upon the west shore of Lake Superior.

III.

That on the 9th day of July, 1870, a certain agreement or contract in writing was entered into between the said Northern Pacific Railroad Company, the Lake Superior and Mississippi Railroad Company, the Lake Superior and Puget Sound Company, and the 308
Western Land Association; that the copy of said agreement or contract in writing attached to and made a part of the bill in this case and marked Exhibit "A" is a true and correct copy of said agreement or contract in writing and is made a part of this stipulation and reference thereto is hereby had for the details thereof. That the point of junction in said contract named is practically the same as the village of Thomson in the state of Minnesota. That said agreement in writing was ratified, confirmed and accepted by the respective board of directors of said companies and all the terms thereof carried out and fulfilled by said respective companies, except as the same may have been in conflict with or prohibited by the laws of the state of Minnesota or Wisconsin as herein set forth.

IV.

309
That the map or plat filed herewith and marked Exhibit "1" is a true and correct copy of a certain map or plat now in the office of the commissioner of the general land office which said map or plat was transmitted by Josiah Perham, the president of the Northern Pacific Railroad Company, to the secretary of the interior, on the 6th day of March 1865, together with his letter of transmittal, which is in the words and figures following, to-wit:

"Washington, D. C., 6 March, 1865.

Hon. John P. Usher,

Secretary of the Interior,

Sir: Under authority from the board of directors of the Northern Pacific Railroad Company, I have designated on the accompanying map, in red ink, the general line of their railroad from a point on Lake Superior, in the state of Wisconsin, to a point on
310 Puget Sound, in Washington Territory, via the Columbia river, adopted by said company as the line of said railroad, subject only to such variations as may be found necessary after more specific surveys, and I respectfully ask that the same may be filed in the office of the commissioner of the general land office, together with a copy of the charter and organization of said company, and that under your directions the land granted to said company may be marked and withdrawn from sale, in conformity to law.

I am respectfully your obt. servant,

JOSIAH PERHAM,

President N. P. R. R. Company."

That thereupon the secretary of the interior transmitted the original of said map, a copy of which is filed herewith, made a part
311 hereof and marked Exhibit "I," together with said letter of the said Josiah Perham, to the commissioner of the general land office, on March 9, 1865, together with his letter of transmittal, which is in the words and figures following, to-wit:

"DEPARTMENT OF THE INTERIOR,

Washington, D. C., March 9, 1865.

Sir: Herewith I transmit a map upon which the 'general line' of the Northern Pacific Railroad, as adopted by the board of directors of that railroad company, is delineated; also a copy of the letter of the president of said company, dated the 6th inst., requesting that the granted lands along said line be withdrawn from market.

In view of the provisions of the 3rd and 6th sections of the act
312 of congress, approved July 2, 1864 (pamphlet laws, pages 368, 369), should you perceive no objection, I think that the odd-numbered sections along the line, for ten miles in width on each side in Minnesota and Wisconsin and for twenty miles in width on each side along that part of the line extending through the territories westward to Puget Sound, may be withdrawn as requested, as preliminary to the final survey and location of said railroad.

The even-numbered sections along the line will, however, be

subject to disposal by the United States, as provided in the 6th section of said act of congress.

Very respectfully your obt. ser't,

J. P. USHER,

Secretary.

The Commissioner of the General Land Office."

That the endorsement upon said letter shows that said map accompanied said letter, and the endorsement upon said map shows 313
that the same was duly filed in the office of the commissioner of the general land office at said time.

V.

That upon the receipt by the commissioner of the general land office of the map mentioned in the foregoing paragraph of this stipulation, transmitted to the secretary of the interior by Josiah Perham, president of the Northern Pacific Railroad Company, on March 5th, 1865, a copy of which is marked Exhibit 1 of this stipulation, said commissioner, on the 22nd day of June, 1865, transmitted a letter relative thereto to the secretary of the interior, which is in the words and figures following, to-wit:

"DEPARTMENT OF THE INTERIOR, 314

General Land Office,

June 22d, 1865.

Hon. James Harlan, Secretary of the Interior,

Sir: The late secretary of the interior, under date of the 9th of March last, enclosed to this office a diagram showing the proposed route of the Northern Pacific railroad, for which a grant of lands was made by the act approved July 2d, 1864. Statutes at large pamphlet laws 1864, p. 365.

This diagram was filed in the secretary's office accompanied by a request for withdrawal of lands.

As no withdrawal was ordered by the late secretary, no action was here taken upon the application.

Mr. Perham the president of the railroad company has called attention to the matter, and, submitting it, I have the honor to state,

1st. That the present application deals with the railroad system of granting on the largest scale known to congressional legislation. 315

It extends from Lake Superior to the Pacific ocean, and, allowing for probable deflections, may be set down at 2,025 miles in length, taking in alternate sections by estimate 47,360,000 acres, in a belt of 40 miles wide through the territories and 20 miles wide

through the states; the general or conjectural course being indicated on the map herewith.

By the opinions of Attorney General Cushing of 19th December, 1856, and 16th February, 1857,—Opinions of Atty's General, Vol. 8, pages 244 and 390,—and the action of the department, railroad grants take effect from the date when the survey of the route is actually made on the face of the earth.

316 The evidence required of the route under the established ruling of the department, is a connected map showing the exact location, the map indicating by flag-staffs the progress of the survey, the map to be authenticated by the affidavit of the engineer with the approval of the accredited chief officer of the grantee. That proof is required to show the precise portions of each section or smallest legal subdivisions cut by the route.

In the judgment of the commissioner, no withdrawal should be ordered until such map is filed in the general land office, and although in the Atty. General's opinion—Mr. Cushing—the right takes hold from the date of actual survey on the ground, yet upon that point this office, with reference to superior legal authority, holds that the grant does not become effective until the map is actually filed in the district land office, where citizens resort to ascer-
317 tain what is public land and what is not, so that purchases can be made without danger of conflicting title. Yet, even admitting that the right in the railroad grant attaches from the date of such survey, we are without the means of ascertaining and determining the interests of rightful claimants until such map is filed.

Now, in this view, the commissioner reports that no withdrawals should be ordered until the map of actual survey, authenticated as indicated, shall be filed in the district and general land offices.

This may be done starting from the cul de sac of Lake Superior, the eastern initial point of the route, and stretching thence westward to the western boundary of Minnesota, the lines of the public surveys having been that far established.

2nd. The same course of proceeding to be had in regard to that
318 portion of the road falling on the western or Pacific side within the range of existing public surveys; but,

3rd. Of course no withdrawal can now be made on account of the road in the region of country extending across that part of the continent between the west boundary of Minnesota to the eastern surveys of Washington Territory, because over that territory the lines of the public surveys have not yet been established.

In this extended locality the withdrawal should only be ordered

as the public surveys are advanced and survey of railroad established in like manner as indicated under 1st head.

4th. A general withdrawal upon conjectural or uncertain basis might result in shutting out from settlement large bodies of land which an actual survey would show not within the grant, whilst lands would be omitted from the withdrawal which the survey might require to be included.

Then it is not sound policy nor is there any warrant in our land 319
legislation for doing any act the tendency of which would give preference to satisfying a grant on such a stupendous scale as this, whilst individual claims under our general system of land laws, homestead, pre-emption and sales, would be unaided by any such preliminary discriminating proceeding.

The result of a premature withdrawal on uncertain basis would be unjust to the pioneer settler, detrimental to the public interests in arresting the progress of settlement and disposal in that direction of the public domain, and to that extent checking the growth and prosperity of our frontier, and that, too, in the vicinity of a colonial dependence of a powerful nation, would be a prejudice to the interests of the railroad grant itself in excluding settlers and immigrants whose labor and means would enhance the value of such lands as in the ordinary progressive operations of the land system would in 320
due time fall to the grant.

The land system should be so administered that all the different acts of land legislation may be at the same time in full operation—giving precedence to no one law over another, unless where the terms of law indicate the public will to be otherwise, leaving corporate or other grantees and individuals respectively to have the benefit of their superior diligence in establishing and completing their several claims according to law.

For these considerations this office declines ordering a withdrawal until authenticated maps of the actual survey of the several portions of the route shall be successively filed from time to time to completion showing the connection of said portions with the lines of the public surveys, yet respectfully submits the foregoing considerations for such directions as the secretary may be pleased to give in the premises for the government of this office. 321

With great respect, your ob't ser't,

JOS. S. WILSON,

Actg Commissioner."

That the following endorsements appear upon said letter in the words, figures and form, to-wit:

Northern Pacific.
Dptmt of Interior.
R 77/377.
Com. Gen. Land Office.
June 22, 1865.
Rec'd June 23, 1865.
Submitting a diagram
322 showing the proposed route
of the Northern Pacific
R. Road, &c.
Secy. sustains Comm's
refusal.
Department
of the
June 23, 1865.
Interior.
One 533
Thompson.

That all of said endorsements are written in ink except the words, "Sec'y sustains Comm's refusal," which said words are writ-
323 ten in lead pencil; that the name of the secretary of the interior is not signed thereto, nor in any way does the name of said secretary appear endorsed upon said letter.

VI.

That the minutes of the board of directors of the Northern Pacific Railroad Company from December 7, 1864, which is the date of the first meeting of said board of directors appearing in said minutes, up to the 18th day of May, 1865, do not show any action by said board of directors with reference to locating the line of the road of said Northern Pacific Railroad Company under said act of congress of July 2, 1864, and said minutes do not show any action by said board of directors conferring special authority upon the president of said company to locate said line.

324 That said map marked Exhibit "1" of this stipulation has remained a part of the files of the interior department since the date of its filing and the Northern Pacific Railroad Company never questioned the authenticity of said map, or the authority of its president to file the same in any proceeding before the land department of the United States, or in any court, prior to July 6, 1882, upon which date the map of definite location marked Exhibit "6" was filed, as set forth in these stipulations.

That in the year 1890 there was tried in the United States Circuit Court for the District of Oregon an action wherein the United States was plaintiff and the Northern Pacific Railroad Company defendant, brought for the recovery of the value of certain lumber manufactured from logs alleged to have been unlawfully cut and removed by the defendant from public lands: that in said case the Northern Pacific Railroad Company and the plaintiff therein stipulated and agreed, among other things, as follows: 325

On the 6th day of March, 1865, Josiah Perham, president of the Northern Pacific Railroad Company, addressed to the secretary of the interior a communication in these words:

"Under authority from the board of directors of the Northern Pacific Railroad Company I have designated on the accompanying map in red ink the 'general line' of their railroad from a point on Lake Superior, in the state of Wisconsin, to a point on Puget Sound, in Washington Territory, via the Columbia river, adopted by said company as the line of said railroad, subject only to such variations as may be found necessary after more specific surveys, and I respectfully ask that the same may be filed in the office of the commissioner of the general land office together with a copy of the charter and organization of said company, and that under your directions the lands granted to said company may be marked and 326 withdrawn from sale in conformity to law."

And upon the same, together with other statements of facts agreed and stipulated, said case was submitted. That said cause is reported in volume 41, Federal Reporter, page 842, and was afterwards appealed to the Supreme Court of the United States and is reported in the 152 United States, page 284.

Other than as herein stipulated, the department of the interior has never taken any action under or relative to said map or made any withdrawals of land thereunder.

VII.

That the powers of the president of the said Northern Pacific Railroad Company, as conferred by the by-laws of the said company adopted January 11, 1865, are in the words and figures following, 327 to-wit:

"THE PRESIDENT.

The president shall have power to call meetings of the board of directors at such time and place as he shall think proper to appoint and it shall be his duty to call such meetings whenever requested so to do, in writing, by any three members of the board.

It shall be his duty to preside at all meetings of the board, to appoint all committees not otherwise appointed, to preserve order, promote the regular and speedy transaction of business, and generally to exercise the same supervisory power and direction over all the affairs, departments and employes of the company as are comonly exercised by the presiding officer of such companies.

He shall be a member ex-officio, of all such standing and select
328 committees.

All letters, reports, and papers of every description received by the secretary or treasurer pertaining to the business of the company shall be submitted to the president, and all instructions emanating from those officers shall be first approved by him, except in cases directed and ratified by the board.

The president shall have the custody of all the official bonds of the company and keep them together as a special deposit subject to the orders of the board.

The president may also exercise such other powers and perform such other duties as the board of directors may from time to time confer or prescribe."

VIII.

329

That in the years 1866, 1867, 1868 and 1869, the Northern Pacific Railroad Company caused exploring and surveying parties to be put into the field for the purpose of ascertaining the most practicable route for a railroad to be constructed under the provisions of the act of congress of July 2, 1864, from a point on Lake Superior, in Minnesota or Wisconsin, to Puget Sound: and during these years, said surveying parties, acting for said Northern Pacific Railroad Company, made surveys of various lines for railroad routes, commencing at about ten different points on Lake Superior and extending westwardly therefrom, and said parties also explored and investigated the country north of the forty-fifth degree of latitude and west of said various points on Lake Superior, and from time to time reported to the board of directors of said Northern Pacific Railroad Company the results of such surveys and explorations.

330

IX.

That a map of definite location filed by said Northern Pacific Railroad Company was duly filed in the general land office of the United States by said company on November 21st, 1871, a copy of which said map is filed herewith and made a part hereof marked Exhibit "2."

X.

That on the 1st day of January, 1872, a certain deed of conveyance by the Lake Superior and Mississippi Railroad Company to the Northern Pacific Railroad Company was duly executed and delivered by the grantor to the grantee therein named and became and was an operative deed of conveyance by which the Northern Pacific Railroad Company acquired an equal, undivided interest in that portion of the railroad grade, track, depots, yards and other property therein mentioned, of the Lake Superior and Mississippi Railroad Company, extending from Thomson Junction to Duluth, including the terminal property, excepting from said conveyance certain premises therein mentioned or described. That Exhibit "A-1" attached to and made a part of the bill in this case is a true and exact copy of said deed and is hereby made a part of this stipulation and reference thereto is hereby had for all the details thereof. 331

XI.

That on said 1st day of January, A. D. 1872, a certain agreement or contract in writing was made and entered into between the Lake Superior and Mississippi Railroad Company and the Northern Pacific Railroad Company relative to the joint management and control of said railroad from Thomson Junction to Duluth, jointly owned by said companies: that the copy of said agreement or contract in writing attached to and made a part of the bill in this action, marked Exhibit B, is a true and correct copy of said agreement or contract in writing, is made a part of this stipulation and reference thereto is hereby had for the details thereof, and that all of the provisions of said agreement or contract in writing were performed and carried out by the said Lake Superior and Mississippi Railroad Company and by the said Northern Pacific Railroad Company; that said Northern Pacific Railroad Company, commencing in the year 1870, did build its road west from Thomson, connecting the same with the Lake Superior and Mississippi Railroad at Thomson, and did, from the 1st day of January 1872, to about the 1st day of January, 1886, run its trains over the line of the Lake Superior and Mississippi Railroad from Thomson Junction to Duluth, in which it had acquired an equal, undivided interest pursuant to and under the agreement or contract in writing herein referred to. 332 333

XII.

That on the 1st day of May, 1872, the said Lake Superior and Mississippi Railroad Company duly made, executed and delivered to

the Northern Pacific Railroad Company a certain contract of lease of its entire line of road: that the copy of said lease attached to and made a part of the bill herein and marked Exhibit "B-1" thereof is a true, accurate and correct copy of said lease, and made a part of this stipulation and reference thereto is hereby had for the details thereof.

334

XIII.

That on the 9th day of August, 1876, a certain agreement or contract in writing was made and entered into by and between the Northern Pacific Railroad Company and the Lake Superior and Mississippi Railroad Company and certain other persons representing the holders of the first mortgage bonds of the Lake Superior and Mississippi Railroad Company, which said agreement or contract in writing ratified and confirmed the deed of which said Northern Pacific Railroad Company acquired a half interest in the Lake Superior and Mississippi railroad from Thomson to Duluth, a copy of which said deed is Exhibit "A-1" of the bill of this case, that the copy of said agreement or contract in writing between the Northern Pacific Railroad Company and the Lake Superior and Mississippi Railroad Company and the persons representing the said bond-
335 holders, which is attached to and made a part of the bill in this case, marked Exhibit "C" thereof, is a true, accurate and correct copy of said agreement or contract in writing, is made a part of this stipulation and reference thereto is hereby had for the details thereof.

XIV.

That the Northern Pacific Railroad Company, from the 1st day of January, 1872, to about the 1st day of January, 1886, operated its said railroad from Duluth, on Lake Superior, to Thomson Junction over said line of the Lake Superior and Mississippi Railroad Company under the deeds, agreements and contracts heretofore stated, and thence westward from Thomson Junction toward the western terminus of said road, and did, during said time, expend
336 large sums of money upon the construction and improvement of said road from Thomson Junction to Duluth, and in the construction and improvement of docks, railroad buildings, wharves and structures of a like nature in the city of Duluth, and that said Northern Pacific Railroad Company did not have any other line of road to any point on Lake Superior until 1881, when their road was built from Thomson Junction eastward to Superior City, on Lake Superior, in the state of Wisconsin.

XV.

That on the 5th day of May, 1864, the congress of the United States passed an act entitled "An act granting lands to aid in the construction of certain railroads in the state of Wisconsin," by the third section of which it is provided as follows:

Sec. 3. And be it further enacted, That there be, and is hereby granted to the state of Wisconsin, for the purpose of aiding in the construction of a railroad from Portage City, Berlin, Doty's Island, 337
or Fond du Lac, as said state may determine, in a northwestern direction to Bayfield and thence to Superior, on Lake Superior, every alternate section of public land, designated by odd numbers, for ten sections in width on each side of said road, upon the same terms and conditions as are contained in the act granting lands to said state to aid in the construction of railroads in said state, approved June three, eighteen hundred and fifty-six."

That thereafter the state of Wisconsin duly conferred said grant of land upon the Portage, Winnebago and Superior Railroad Company, and said Company did, on the 10th day of November, 1869, file in the land department of the United States their map showing the definite location of their line of road as prescribed in the act of congress herein referred to, a copy of which said map is 338
filed herewith and made a part of this stipulation, marked Exhibit "3," which said map of definite location was duly accepted by the land department of the United States and the lands within the limits of the grant, as shown by said map, were, by the proper officers of the United States, duly withdrawn from settlement and entry, and so remained until after the filing of the map of July 6, 1882, by the Northern Pacific Railroad Company, a copy of which said map is filed herewith, made a part hereof and marked Exhibit "6."

XVI.

That the defendant, The Northern Pacific Railroad Company, is a corporation created, organized and existing under and by virtue of an act of congress approved July 2, 1864, entitled "An act grant- 339
ing lands to aid in the construction of a railroad and telegraph line from Lake Superior to Puget's Sound, on the Pacific coast, by the northern route," and the acts and joint resolutions of congress supplemental thereto and amendatory thereof.

XVII.

That by the terms and provisions of section 1 of said act of congress, approved July 2, 1864, it was, among other things, provided as follows:

"And said corporation is hereby authorized and empowered to lay out, locate, construct, furnish, maintain and enjoy a continuous railroad and telegraph line, with the appurtenances, namely, beginning at a point on Lake Superior, in the state of Minnesota or Wisconsin, thence westerly by the most eligible railroad route, as shall be determined by said company, within the territory of the United States, on a line north of the 45th degree of latitude, to some point on Puget's Sound, with a branch via the valley of the Columbia river to a point at or near Portland, in the state of Oregon, leaving the main trunk line at the most suitable place, not more than three hundred miles from its western terminus, and is hereby vested with all the powers, privileges and immunities necessary to carry into effect the purposes of this act as herein set forth."

XVIII.

That by section 3 of said act of congress, approved July 2, 1864, it was further provided as follows:

"And be it further enacted, That there be and hereby is granted to the Northern Pacific Railroad, its successors and assigns, for the purpose of aiding in the construction of said railroad and telegraph line to the Pacific Coast, and to secure the safe and speedy transportation of the mails, troops, munitions of war, and public stores over the route of said line of railway, every alternate section of public land, not mineral, designated by odd numbers, to the amount of twenty alternate sections per mile, on each side of said railroad line as said company may adopt, through the territories of the United States, and ten alternate sections of land per mile on each side of said railroad whenever it passes through any state, and whenever on the line thereof the United States have full title, not reserved, sold, granted, or otherwise appropriated, and free from pre-emption or other claims or rights at the time the line of said road is definitely fixed and a plat thereof filed in the office of the commissioner of the general land office; and whenever, prior to said time, any of said sections or parts of sections shall have been granted, sold, reserved, occupied by homestead settlers, or pre-empted or otherwise disposed of, other lands shall be selected by said company in lieu thereof, under the direction of the secretary of the interior, in alternate sections and designated by odd numbers, not

more than ten miles beyond the limits of said alternate sections: Provided, That if said route shall be found upon the line of any other railroad route, to aid in the construction of which lands have been heretofore granted by the United States, as far as the routes are upon the same general line, the amount of land heretofore granted shall be deducted from the amount granted by this act: Provided, further, That the railroad company receiving the previous grant of land may assign their interest to said "Northern Pacific Railroad 343
Company," or may consolidate, confederate and associate with said company upon the terms named in the first section of this act: Provided, further, That all mineral lands be and the same are hereby excluded from the operations of this act, and in lieu thereof a like quantity of unoccupied and unappropriated agricultural lands, in odd-numbered sections, nearest to the line of said road may be selected as above provided; and provided further, That the word "mineral," when it occurs in this act, shall not be held to include iron or coal; and provided further, That no money shall be drawn from the treasury of the United States to aid in the construction of the said "Northern Pacific Railroad."

XIX.

That by section 4 of said act of congress approved July 2, 1864, 344
it was further provided as follows:

"And be it further enacted, That whenever said "Northern Pacific Railroad Company" shall have twenty-five consecutive miles of any portion of said railroad and telegraph line ready for the service contemplated, the president of the United States shall appoint three commissioners to examine the same, and if it shall appear that twenty-five consecutive miles of said road and telegraph line have been completed in a good, substantial and workmanlike manner, as in all other respects required by this act, the commissioners shall so report to the president of the United States, and patents of lands as aforesaid shall be issued to said company, confirming to said company the right and title to said lands situated opposite to and coterminous with said completed section of said road, and, from time to time, whenever twenty-five additional consecutive miles shall have been constructed, completed and in readi- 345
ness as aforesaid, and verified by said commissioners to the president of the United States, then patents shall be issued to said company conveying the additional sections of land as aforesaid, and so on as fast as every twenty-five miles of said road is completed as aforesaid: Provided, That not more than ten sections of land per mile, as said road shall be completed shall be conveyed to said com-

pany for all that part of said railroad lying east of the western boundary of Minnesota, until the whole of said railroad shall be finished and in good running order, as a first-class railroad from the place of beginning on Lake Superior to the western boundary of Minnesota; Provided, also: That lands shall not be granted under the provisions of this act on account of any railroad or part thereof constructed at the date of the passage of this act."

346

XX.

That by section 6 of said act of congress, approved July 2, 1864, it was further provided as follows:

"And be it further enacted, that the president of the United States shall cause the lands to be surveyed for forty miles in width on both sides of the entire line of said road, after the general route shall be fixed, and as fast as may be required by the construction of said railroad: and the odd sections of land hereby granted shall not be liable to sale or entry or pre-emption before or after they are surveyed, except by said company, as provided in this act, but the provisions of act of September, eighteen hundred and forty-one, granting pre-emption rights, and the acts amendatory thereof, and of the act entitled 'An act to secure homesteads to actual settlers on
347 the public domain,' approved May twenty, eighteen hundred and sixty-two, shall be, and the same are hereby extended to all other lands on the line of said road, when surveyed, excepting those hereby granted to said company. And the reserved alternate sections shall not be sold by the government at a price less than two dollars and fifty cents per acre when offered for sale."

XXI.

That by section 12 of said act of congress approved July 2, 1864, it was further provided as follows:

"And be it further enacted. That the acceptance of the terms, conditions and impositions of this act by the said Northern Pacific Railroad Company shall be signified in writing under the corporate seal of said company, duly executed pursuant to the direction of its
348 board of directors first had and obtained, which acceptance shall be made within two years after the passage of this act, and not afterwards, and shall be served on the president of the United States."

XXII.

That by section 15 of said act of congress, approved July 2, 1864, it was further provided as follows:

"And be it further enacted, That the president, vice-president and directors shall hold their offices for the period indicated in the by-laws of said company, not exceeding three years respectively, and until others are chosen in their place and qualified. In case it shall so happen that an election of directors shall not be made on any day appointed by the by-laws of said company, the corporation shall not for that excuse be deemed to be dissolved, but such election may be holden on any day which shall be appointed by the 349
directors. The directors of whom seven, including the president, shall be a quorum for the transaction of business, shall have full power to make and prescribe such by-laws, rules and regulations as they shall deem needful and proper, touching the disposition and management of the stock, property, estate and effects of the company, the transfer of shares, the duties and conduct of their officers and servants touching the election and meeting of the directors and all matters whatsoever which may appertain to the concerns of said company: and the said board of directors may have full power to fill any vacancy or vacancies that may occur from any cause or causes from time to time in their said board. And the said board of directors shall have power to appoint such engineers, agents and subordinates as may from time to time be necessary to carry into effect the object of the company, and to do all acts and things touching 350
the location and construction of said road."

XXIII.

That by section 17 of said Act of Congress, approved July 2, 1864, it was further provided as follows:

"And be it further enacted, that the said company is authorized to accept to its own use any grant, donation, loan, power, franchise, aid or assistance which may be granted to or conferred upon said company by the congress of the United States, by the legislature of any state or by any corporation, person, or persons, and said corporation is authorized to hold and enjoy any such grant, donation, loan, power, franchise, aid, or assistance, to its own use for the purpose aforesaid."

351

XXIV.

That by section 18 of said act of congress approved July 2, 1864, it was further provided as follows:

"And be it further enacted, That said Northern Pacific Railroad Company shall obtain the consent of the legislature of any state

through which any portion of said railroad line may pass, previous to commencing the construction thereof; but said company may have the right to put on engineers and survey the route before obtaining the consent of the legislature."

XXV.

352 That for the purpose of complying with the requirements of section 12 of said act of congress of July 2, 1864, the said Northern Pacific Railroad Company duly accepted the terms, conditions and impositions of said act in writing, under its corporate seal, executed pursuant to the directions of its board of directors, first had and obtained, and on the 29th day of December, A. D. 1864, served such written acceptance on the president of the United States.

XXVI.

That by a joint resolution of congress approved May 31st, 1870, entitled "A resolution authorizing the Northern Pacific Railroad Company to issue bonds for the construction of its road and to secure the same by mortgage, and for other purposes," it was resolved
353 and provided that in the event of there not being in any state or territory in which the main or branch line of said road might be located at the time of the final location thereof, the amount of lands per mile granted by said act approved July 2, 1864, to said company within the limits prescribed by said act, the said Northern Pacific Railroad Company should be entitled, under the direction of the secretary of the interior, to receive as many sections of land belonging to the United States and designated by odd numbers, in such state or territory within ten miles on each side of said road beyond the limits prescribed in said act of July 2, 1864, as would make up the deficiency on said main or branch line (except mineral or other lands as excepted in the charter of said company of 1864) to the amount of the lands that had been granted, sold, reserved, occupied by homestead settlers, pre-empted or otherwise disposed of subsequent to the passage of the act of July 2, 1864.

354

XXVII.

That hereafter the legislature of the state of Minnesota passed an act which was duly approved on the 2nd day of March, 1865, entitled "An act to aid in the construction of the Northern Pacific Railroad and Telegraph line from Lake Superior to Puget's Sound":

being chapter 69 of the special laws of Minnesota for the year 1865, which said act is in the words and figures following, to-wit:

"Whereas, the congress of the United States of America did by an act entitled "An act granting lands to aid in the construction of a railroad and telegraph line from Lake Superior to Puget Sound, on the Pacific Coast, by the Northern route," approved the second day of July, 1864, create a body politic and corporate by the name, style and title of the "Northern Pacific Railroad Company," and, among other things, did authorize and empower said company to lay out, construct, furnish, maintain and enjoy a continuous railroad and telegraph line, with the appurtenances, namely: beginning at a point on Lake Superior, in the State of Minnesota or Wisconsin, thence westerly by the most eligible railroad route to be determined by said company, within the territory of the United States, on a line north of the forty-fifth degree of latitude to some point on Puget Sound, with a branch via the valley of the Columbia river to a point at or near Portland, in the State of Oregon, leaving the main trunk line at the most suitable place not more than three hundred miles from its western terminus, and did also vest in said company all the rights, powers, privileges and immunities necessary to carry into effect the purpose of said act as therein set forth. 355

And whereas, the congress of the United States did also, by said act, authorize said Northern Pacific Railroad Company to accept, hold and enjoy to its own use any grant, donation, loan powers, franchise, aid or assistance which might be granted to said company by the congress of the United States, by the legislature of any state or by any corporation, person or persons, for the purposes of said act. 356

And whereas, the said Northern Pacific Railroad Company was also required by said act to obtain the consent of the legislature of any state through which any portion of said railroad line might pass previous to commencing the construction thereof: Now therefore,

Be it enacted by the Legislature of the State of Minnesota, Section 1.

That the consent of the state be and the same is hereby given to the said Northern Pacific Railroad Company, to survey, lay out, locate, construct, furnish, maintain and enjoy a continuous railroad and telegraph line with the appurtenances within its limits, on the line in said act of congress authorized, and for the purposes aforesaid in said act of congress set forth, and in order to carry the same into full effect, the said Northern Pacific Railroad Company, its successors and assigns, are hereby vested with all the rights, powers, privileges and immunities, within the limits of this state, which are by said act of congress conferred upon them within the territories and jurisdiction of the United States subject to the conditions 357

in said act contained, and to the following proviso: Provided, That should the said company elect to make the eastern terminus of said road east of the eastern boundary of the State of Minnesota, then and in that case, they shall construct or cause to be constructed a line of railroad from the said main line to the navigable waters of Lake Superior, within the State of Minnesota, of the same gauge as said main line, for which purpose the same powers, rights and privileges are hereby granted to said company as they have to construct
358 said main line within the State of Minnesota:

And provided further, That nothing in this act contained shall be construed as exempting the road-bed and other property of said company within this state from taxation."

XXVIII.

That thereafter the legislature of the state of Wisconsin passed an act, duly approved on the 10th day of April, 1865, entitled "An act to authorize the Northern Pacific Railroad and Telegraph Company, incorporated by an act of congress entitled 'An act granting lands to aid in the construction of a railroad and telegraph line from Lake Superior to Puget's Sound, on the Pacific Coast, by the North-
359 ern route,' approved July 2nd, 1864, to construct their railroad and telegraph line through the state of Wisconsin," being chapter 485 of the private and local laws of Wisconsin for the year 1865, which act is in the words and figures following, to-wit:

"Section 1. The consent of the state of Wisconsin is hereby given to the Northern Pacific Railroad Company, incorporated by an act of congress entitled 'An act granting lands to aid in the construction of a railroad and telegraph line from Lake Superior to Puget Sound on the Pacific Coast, by the Northern route,' approved July 2nd, 1864, to survey, lay out, locate, construct, furnish, maintain and enjoy a continuous railroad and telegraph line, with the appurtenances, within its limits, on the line within the said act of congress indicated and authorized: and for the purposes aforesaid, and in said act of congress set forth, and in order to carry the same into full effect, the said Northern Pacific Railroad Company, its suc-
360 cessors and assigns, are hereby vested with all the rights, powers, privileges and immunities within the limits of this state which are by said act of congress conferred upon them within the territories and jurisdiction of the United States: Provided, That said Northern Pacific Railroad Company shall be prohibited at any time prior to the actual building or equipment of said railroad, from allowing any railroad company chartered by the laws of the state of Minnesota,

to use or enjoy any of the privileges hereby granted to the Northern Pacific Railroad Company, to be exercised in the state of Wisconsin: And provided further, That nothing herein contained shall be construed to prevent the said Northern Pacific Railroad Company after the building and equipment of said road through the state of Wisconsin, from making such contracts for connections with Minnesota railroads, in the state of Wisconsin, (as) they may deem proper.

Section 2. This act shall take effect and be in force from and 361
after its passage and publication."

XXIX.

That thereafter the legislature of the state of Wisconsin passed an act duly approved on the 10th day of March, 1870, entitled "An act to amend chapter 485 of the private and local laws of Wisconsin, entitled an act to authorize the Northern Pacific Railroad and Telegraph Company, incorporated by an act of Congress, entitled an act granting lands to aid in the construction of a railroad and telegraph line from Lake Superior to Puget's Sound, on the Pacific Coast, by the northern route, approved July 2d, 1864, to construct their railroad and telegraph line through the state of Wisconsin, approved April 10, 1865: being chapter 253 of the private and local laws of 362
Wisconsin for the year 1870, which act is in words and figures following, to-wit:

"Section 1. Chapter 485 of the private and local laws of 1865 is hereby amended by adding to the end of the first section thereof the following, to-wit: and provided, further, that it shall not be lawful for the said Northern Pacific Railroad Company to bring the line of its road from Minnesota into Wisconsin, nor from Wisconsin into Minnesota by crossing in any manner, whether by bridge, ferry or otherwise, the entry of the Bay of Superior between Minnesota Point, in the state of Minnesota, and Wisconsin Point, in the state of Wisconsin, nor to construct or operate any railroad on or along the said Wisconsin Point for the purpose of a connection by that route with its own or any other railroad that may be constructed on or along said Minnesota Point. And the consent hereinbefore given is upon the express condition and understanding that at any time 363
before the said Northern Pacific Railroad Company shall construct and operate to some point in Wisconsin on the west shore of the Bay of Superior, a line of railroad continuous of and connecting with its main line in Minnesota by a route intersecting the western boundary of Wisconsin, between the Nemadji and the St. Louis rivers, and running all the way in the latter state between said rivers, it shall

permit any other railroad which may be constructed from the west shore of the Bay of Superior, in Wisconsin, to any point on the line of the said Northern Pacific Railroad, whether in Wisconsin or Minnesota, to make a connection with the said Northern Pacific Railroad on such terms and conditions as shall afford as good advantages and facilities in the respect of charges and dispatch, and in all other respects for the transportation of freight and passengers, be-
364 tween the eastern terminus aforesaid, of the said other railroad and all points on the said Northern Pacific Railroad as shall be enjoyed for the transportation of freight and passengers between the Minnesota shore of the Bay of Superior, or of St. Louis Bay or of Lake Superior, and all points on the said Northern Pacific Railroad, whether over the latter road or any other railroad with which it may have connections, or both. And the legislature may at any time hereafter pass such laws and authorize such proceedings as may be necessary to enforce the observance of any provision or condition of this act according to its spirit and intent.

Section 2. This act shall take effect and be in force from and after its passage."

XXX.

365

That thereafter the legislature of the state of Wisconsin passed an act duly approved on the 25th day of March, 1872, entitled "An act to amend chapter 485, private and local laws of 1865, and chapter 253, private and local laws of 1870, and to prescribe further conditions upon which the Northern Pacific Railroad Company may construct and operate its railroad and telegraph line in this state:" being chapter 139 of the private and local laws of Wisconsin for the year 1872, which act is in the words and figures following, to-wit:

"Section 1. Any consent heretofore given by the legislature of this state to the Northern Pacific Railroad Company to construct, operate and maintain a railroad and telegraph line in the state of Wisconsin, is hereby made subject to the further conditions, that the said Northern Pacific Railroad Company shall construct and for-
366 ever maintain and operate to some point on the southwesterly shore of the Bay of Superior, between the Nemadji river and Connor's Point, a line of railroad connecting with and continuous to the main line of said Northern Pacific Railroad, by a route running south of St. Louis river from the junction of said Northern Pacific Railroad with the Lake Superior and Mississippi Railroad intersecting the western boundary of Wisconsin at some point between the St. Louis and Nemadji rivers, and running thence all the way in Wisconsin be-

tween said rivers, and also shall construct and forever maintain, at some place where said railroad shall touch the said Bay of Superior, between the said Nemadji river and Connor's Point, sufficient docks or piers, suitable and convenient for the transfer of passengers and freight from its cars on said road to lake-going craft, and from said craft to said cars, and also, shall establish and forever maintain at some place between the said Nemaji river and Connor's Point, a sufficient depot for the accommodation of passengers. And until 367
the said Northern Pacific Railroad Company shall construct and operate such railroad to the southwesterly shore of the Bay of Superior as aforesaid, and shall so construct said docks or piers and the said depot, it shall not be lawful for the said company to construct or maintain or operate any other railroad in Wisconsin: provided, that the provisions of this section shall not apply to any road within the boundaries of Pierce or Saint Croix (county).

Section 2. Any purchase by the Northern Pacific Railroad Company of, or the consolidation of its line with any other railroad whose line shall conform to the route above prescribed shall, for the purpose of this act, be deemed equivalent to a construction by said Northern Pacific Railroad Company of its said railroad, for such distance as the road so purchased or consolidated with shall be constructed on said route. 368

Section 3. The said Northern Pacific Railroad Company is hereby forever prohibited from constructing, maintaining or operating any railroad or railroad bridge, or bridge of any kind across the Bay of Superior between Minnesota Point and the shores opposite the same.

Section 4. The said Northern Pacific Railroad Company shall be governed by the provisions of the general railroad law of this state in respect to width of roadway and acquiring title to lands.

Section 5. The foregoing limitations upon the powers of the Northern Pacific Railroad Company are hereby declared to be conditions of any consent given by this state to said company to construct a railroad line in this state.

Section 6. This act shall take effect from and after its passage."

369

XXXI.

That prior to the 13th day of August, 1870, the board of directors of the Northern Pacific Railroad Company adopted the location of the general route of a portion of its railroad and on said 13th day of August, 1870, transmitted to the secretary of the interior two maps showing the location of the said portion of said general route

so adopted, which said two maps were thereupon duly filed in the office of the commissioner of the general land office, that Exhibits 4 and 5 filed herewith and made a part hereof are copies of said maps and show the location of said portion of said general route as indicated upon said two maps. That the secretary of the interior, upon the receipt of said two maps, transmitted the same to the commissioner of the general land office, who thereupon filed the same
370 as aforesaid, and the said secretary of the interior transmitted to the said commissioner of the general land office, at the same time, a letter in words and figures following, to-wit:

"Department of the Interior,
Washington, D. C., Aug. 13th, 1870.

Sir: I transmit herewith two maps showing the designated route of the Northern Pacific Railroad.

You will immediately direct the proper local land officers in the states of Wisconsin and Minnesota to withhold from said preemption, homestead and other disposal the odd numbered sections not sold, reserved, and to which prior rights have not attached, within 20 miles on each side of the route, and in like manner direct those officers in Washington territory to withhold such odd num-
371 bered sections as lie south of the town of Stilacoom. The unsurveyed as well as the surveyed lands will be included in the reservation, and you will direct the local officers to give notice accordingly, and as the township plats are received by them, they will make the proper notes of reservation thereon.

The withdrawal will take effect from the receipt of the order at the local office.

Very respectfully,
Your Ob't servant,
J. D. COX, Secretary."

Hon. Jos. S. Wilson,
Commissioner of the General Land Office.

XXXII.

372

That after the filing of the maps marked Exhibits "4" and "5" and made a part of the XXXI paragraph of this stipulation, the commissioner of the general land office caused to be prepared a diagram showing all odd numbered sections of land lying within twenty miles of the line of general route in the state of Wisconsin, as indicated on said map, and the said commissioner, on the 15th day of November, 1870, transmitted said diagram to the United

States district land officers at Bayfield, Wisconsin, together with a letter of instructions in the words and figures following, to-wit:

"Department of the Interior,
General Land Office,
September 15th, 1870.

Register and Receiver,
Bayfield, Wis.

Gentlemen—I transmit herewith a diagram showing the designated route of the Northern Pacific Railroad under act July 2d, 1864, and by direction of the secretary of the interior, you are requested to withhold from sale or location, pre-emption or homestead entry all the odd numbered sections of public lands falling within the limits of 20 miles, as designated on this map. 373

You will also increase in price to $2.50 per acre the even numbered sections within those limits and dispose of them at that ratability under the pre-emption and homestead laws only, no private entry of the same being admissible until these lands have been offered at the increased price.

This order will take effect from the date of its receipt by you, and you are requested to acknowledge without delay the time of its receipt. 374

Very respectfully,
JOS. S. WILSON,
Commissioner."

XXXIII.

That thereafter in all cases where cash payment was required under the laws of the United States, the said district land officers required and demanded payment of all lands included in even numbered sections alternate to said lands so withdrawn, at the rate of $2.50 per acre, pursuant to said instructions of the commissioner of the general land office: and the United States disposed of and received payment for large quantities of lands so situated at the rate of $2.50 per acre which otherwise would have been subject to acquisition under the land laws of the United States at the rate of $1.25 per acre. 375

XXXIV.

That thereafter the chief engineer of the Northern Pacific Railroad Company prepared a map showing the proposed line of definite location of a portion of said railroad from a point on the St. Paul

& Duluth Railroad in section 1, township 48 north, of range 17 west of the fourth principal meridian, in the state of Minnesota, now known as Thomson Junction, eastwardly to a point in section 15, township 47 north, of range 2 west of the fourth principal meridian in Wisconsin.

That on May 9th, 1882, the executive committee of the board of directors of said Northern Pacific Railroad Company duly adopted
376 the following resolution, to-wit:

"The chief engineer having made and forwarded a map or plat of that part of the company's main line of railroad which extends from a point on said main line in section 1, of township 48 north, range 17 west of the fourth principal meridian in the state of Minnesota, to the crossing of Bad river to section 15, of township 47 north, range 2 west of said meridian in the state of Wisconsin, duly verified by his affidavit on the 17th day of April, 1882, whereon is indicated by a red line the said definite location, and the same being carefully considered, it was on motion of Mr. Harris:

RESOLVED, That the said map or plat be and the same is hereby approved, and the line of the Northern Pacific Railroad as above described is hereby definitely fixed on, and according to, the said red line indicated and laid down on said map. And the president of the
377 company is requested to certify the said plat and to cause it to be filed in the office of the commissioner of the general land office."

That the said executive committee of the board of directors of said Northern Pacific Railroad Company was duly authorized by said company to take such action on its behalf.

XXXV.

That thereafter, and in accordance with said resolution of said executive committee, the president of the said Northern Pacific Railroad Company duly certified said map showing said line of definite location by attaching thereto his certificate in words and figures following, to-wit:

"Office of the Northern Pacific Railroad Company,
378 No. 83 Broadway, New York, May 10, 1882.

It is hereby certified that in pursuance of an act of congress approved July 2, 1864, entitled "An act granting land to aid in the construction of a railroad and telegraph line from Lake Superior to Puget Sound on the Pacific Coast by the Northern route," this map was made to show and does show the definite location of the line of the Northern Pacific Railroad from a point on the main line, in section 1, township 48 north, range 17 west of the 4th principal merid-

ian in the state of Minnesota to the crossing of Bad River to section 15, township 47 north, range 2 west of 4th principal meridian in the state of Wisconsin, as definitely fixed and determined in compliance with said act of congress and approved by the board of directors of said company by a resolution passed on the 9th day of May, 1882; and it is further certified that A. Anderson, whose signature is attached to the affidavit on this map, is, and at the date of said affidavit was, the duly appointed and empowered engineer-in-chief of 379
the Northern Pacific Railroad.

H. VILLARD,
President Northern Pacific Railroad Company.

Attest:
SAMUEL WILKESON,
(Seal) Secretary."

And there was attached to said map the affidavit of A. Anderson, engineer-in-chief of the Northern Pacific Railroad Company, in words and figures following, to-wit:

"State of Minnesota,)
)ss.
County of Crow Wing.)

A. Anderson of Brainerd, in said county, deposes and says that 380
he is the engineer-in-chief of the Northern Pacific Railroad from Lake Superior to Puget Sound, that the line of said railroad has been and is definitely located and fixed from a point on the main line of the Northern Pacific Railroad in section 1, township 48 north, range 17 west of the 4th principal meridian, in the state of Minnesota, to the crossing of Bad River to section 15, township 47 north, range 2 west of 4th principal meridian, in the state of Wisconsin.

A. ANDERSON,
Engineer-in-Chief N. P. R. R.

Sworn to and subscribed before me this 17th day of April, A. D. 1882.

G. A. HOLLAND,
(Seal) Notary Public."

That thereafter and on or about the 3rd day of July, 1882, in pursuance of said resolution of said executive committee, said presi- 381
dent of said Northern Pacific Railroad Company duly transmitted said map of definite location, so certified by him and verified by said affidavit of said chief engineer to the secretary of the interior together with a letter in words and figures following, to-wit:

"H. Villard, Northern Pacific Railroad Company.
President. President's Office,
"New York, July 3d, 1882.

HON. H. M. TELLER,
Secretary of the Interior,
Washington, D. C.

Sir: I have the honor to inform you that I have to-day sent to your address, by express, the map or plat of the definite location of the main line of the Northern Pacific Railroad from a point on the main line of said railroad at its junction with the St. Paul & Duluth
382 Railroad near the right bank of the St. Louis river, in the state of Minnesota, thence in an easterly direction to a point in section 15, township 47 north, range 2 west of the fourth principal meridian in the state of Wisconsin, lying and being partly in the state of Minnesota and partly in the state of Wisconsin.

That the map is duly verified by the chief engineer and certified by me as the president of the company, and I respectfully request that it be transmitted to the honorable, the commissioner of the general land office for filing in his office and for such necessary and appropriate action thereon as shall be in compliance with law and the practice of the department.

I beg leave to refer to section 3 of the act of congress approved July 2, 1864, commonly known as the Charter of the Northern Pacific Railroad Company.

383 I have the honor to be, very respectfully,

Your obed't servant,

H. VILLARD, President."

XXXVI.

That exhibit 6 filed herewith and made a part hereof shows the location of said line of definite location as indicated upon the map adopted by the resolution of the executive committee and transmitted by the president of said railroad company to the secretary of the interior on the 3rd day of July, 1882, as set out in paragraph XXXV of this stipulation.

XXXVII.

That thereafter, on July 6, 1882, the said map was duly trans-
384 mitted to the commissioner of the general land office by the chief clerk of the secretary of the interior, in accordance with the practice of the department of the interior, on the 22nd day of November, A. D. 1882, the said secretary of the interior transmitted to the said commissioner of the general land office a letter of instructions in the words and figures following, to-wit:

"Department of the Interior,
Washington, November 22, 1882.

The Commissioner of the General Land Office.

Sir: In reply to your letter of the 5th ultimo, in relation to the adjustment of the withdrawal of lands for the benefit of the Northern Pacific Railroad Company under its grant of July 2, 1864, to conform to the line of route as definitely located, you are directed to make an adjustment of the route in accordance with the maps of 385
definite location filed in 1881 and 1882, upon which the road is constructed from the boundary line between Dakota and Montana, to the last crossing of the Yellowstone river, and such other portions of the road as have been definitely located without material deviation from the line of general route, and where the road has been constructed.

The purpose is to permit the adjustment of the withdrawal of lands lying along so much of the railroad as has been constructed, as above described. This will carry out the direction of the president in approving the recommendation of this department, that such portions of the Northern Pacific Railroad as have been constructed in accordance with law be accepted, and that patents be issued for the lands earned.

It appears that the maps of definite location, filed as above, 386
show but slight divergence from former maps, except where the line of the railroad enters the Crow Reservation in Montana, which deviation was authorized by the act of July 10, 1882 (22 Stat. 157).

Very respectfully,
H. M. TELLER,
Secretary."

XXXVIII.

That thereupon, and on the 5th day of January, 1883, complying with the direction of the secretary of the interior, the commissioner of the general land office prepared a diagram showing the line of said definite location, and transmitted the same to the United States district land office at Bayfield, Wisconsin, together with a letter of instructions in the words and figures following, to-wit:
387

"Washington, D. C., Jan. 5, 1883.

Register and Receiver,
Bayfield, Wisconsin.

Gentlemen: On the 6th day of July last a map showing the definite location of the line of the Northern Pacific Railroad, from a point on the main line in section 1, town 48 north, range 17

west of the fourth principal meridian in Minnesota, eastwardly to a point in section 15, town 47 north, range 2 west in Wisconsin, was received in this office with a letter from H. Villard, president of the company, to the secretary of the interior, dated the 3rd of the same month. This map was certified by the chief engineer April 17, and by the president of the company May 10, 1882. Sept. 19, 1882, a map of twenty-five miles of constructed road from the point
388 first above mentioned to a point near Bluff Creek in the city of Superior, Wis., in section 32, town 49 north, range 13 west, was received with department letter of the 18th advising this office that said road had been accepted by the president.

In a letter dated Nov. 22, 1882, the secretary directed that the withdrawals of land for the grant to said Northern Pacific Railroad Company be adjusted in accordance with the maps of definite location where there is no material variation from the line of general route, and where the road has been constructed. The line of definite location upon which the section above mentioned has been constructed does not follow the general route exactly, but the greatest divergence from that line is not more than five or six miles, and under the rulings in similar cases, this is not considered a material variation. A diagram showing the twenty, thirty and forty mile
389 limits of the grant opposite said constructed road adjusted to the line of definite location, as well as the twenty mile limit of the withdrawal on general route, has been prepared, and I enclose a copy of so much thereof as relates to lands in your district.

Said limits are designated as follows: The twenty mile definite limit is shown by a line shaded yellow, the thirty mile limit by a red line, the forty mile limit by a green line, and the twenty mile limit of general route by a blue line. You are directed to withhold from sale or entry all the odd-numbered sections to the extent of the forty mile (green) line. The even-numbered sections within the new twenty mile (yellow) limit will be held subject to pre-emption, homestead or timber culture entry (if naturally devoid of timber) only, and where taken by pre-emption, at the rate of $2.50 per acre, except where settlement was prior to the date of the receipt by you
390 of this order.

The even-numbered sections between the new twenty and forty mile limits will also be held subject to entry as above, but at the rate of $1.25 per acre, with the exception of such tracts as are now held at the double minimum price because of other grants for railroad purposes, and such as are outside the new twenty mile limit and inside the twenty mile limit of general route will, so far as not affected by withdrawals for other grants, be reduced to $1.25 per

acre. The rights of other companies will not be affected by this order; neither will the withdrawal hereby made change the status of lands withdrawn on general route beyond the terminal limit shown on the diagram. Report promptly the receipt of this letter and diagram.

Very respectfully,
L. HARRISON,
Acting Commissioner." 391

XXXIX.

That on the 17th day of May, 1883, the secretary of the interior further instructed the commissioner of the general land office to withdraw all odd numbered sections of public land coterminous with and situated within thirty miles of said line of definite location of said railroad, without reference to the actual construction of said railroad.

That thereupon and on the 22nd day of June, 1883, the commissioner of the general land office, complying with the instructions of the secretary of the interior, made and issued an order to the United States district land offices at Bayfield, Wisconsin, in words and figures following, to-wit: 392

"Washington, D. C., June 22, 1883.

Register and Receiver,
Bayfield, Wisconsin.

Gentlemen: A map showing the line of the Northern Pacific R. R. as definitely located from a point in section 1, town 48 north, range 17, in the state of Minnesota, eastward to a point in section 15, town 47 north, range 2 west, Wisconsin, was received in this office July 6, 1882, with a letter dated 3d, same month, from H. Villard, president of said company, to the secretary of the interior, referred by the chief clerk of the department July 5, 1882.

Pursuant to the decision of the Hon. Secretary of the Interior, dated November 22, 1882, you were directed by letter of January 5, 1883, to withdraw from sale or entry the odd-numbered sections opposite that portion of the line shown on said map upon which the road had been constructed, to the extent of the twenty and thirty mile limits fixed by the granting act of July 2, 1864 (13 Stat. 365), and the additional ten mile limit provided by the joint resolution of May 31, 1870, (16 Stat. 378). Under date of 17th ult. the secretary decided that withdrawals of land opposite the line of definitely located road should be ordered, but in future only to the extent of the first indemnity belt, the limits of which are fixed by the act of 393

1864, at thirty miles on each side of the line adopted through the states. I transmit herewith a diagram showing the twenty mile (granted) and thirty mile (indemnity) limits extended east opposite said definitely located line from their connection with the same limits of the withdrawal of 5th January last, so far as they fall within your district, and, also, the twenty mile limit of the withdrawal ordered Sept. 15, 1870, upon the filing of the map of general
394 route of said road in this office.

The twenty mile limit of definite location is designated by a line shaded blue, and the thirty mile limit by one shaded brown, while the twenty mile limit of general route is shown by one of a neutral tint.

You are instructed to withhold from sale or entry all the land in odd-numbered sections to the extent of the thirty mile (brown) limits not already withdrawn. The even numbered sections falling within the new twenty line (blue) limit will be held subject to entry only under the pre-emption and homestead laws, or the timber culture act, if subject to entry under said act, and where taken by pre-emption or commuted homestead entries payment must be made at the rate of $2.50 per acre, unless in the former case settlement was made prior to the neglect by you of the order increasing the
395 price of the land. So far as this grant is concerned, the even-numbered sections within the twenty mile limit of general route which now fall between the twenty and thirty mile limits of definite location will be reduced to $1.25 per acre, and will, with the other even sections between said limits, be held subject to entry as above at that price, where they have not been increased to double minimum by withdrawals for other grants.

The rights of companies claiming under other grants will not be affected by this order of withdrawal. Report promptly the date of receipt by you of this letter and accompanying diagram.

Very respectfully,

N. C. McFARLAND,

Commissioner."

XL.

396 That thereafter, and on the 8th day of October, A. D. 1883, the secretary of the interior instructed the commissioner of the general land office to withdraw and withhold from sale or entry or pre-emption all odd-numbered sections of public land coterminous with and situated within forty miles of said line of definite location as shown upon said map of definite location so filed as aforesaid. And thereafter, and on the 20th day of October, A. D. 1883, in pursuance

of said instructions of the secretary of the interior, the commissioner of the general land office made and issued an order to the United States district land office at Bayfield, Wisconsin, in words and figures following, to-wit:

"Washington, D. C., Oct. 20th, 1883.

Register and Receiver,
Bayfield, Wisconsin.

Gentlemen: Under date of 8th inst. the Hon. Secretary of the 397
Interior instructed this office to withdraw lands for the benefit of the grant to the Northern Pacific R. R. Co. opposite the line of said company's road as definitely located in the states to the extent of the second, or forty mile, indemnity limits.

The withdrawal opposite said line as definitely located eastward from Superior, Wis., ordered by my letter to you dated June 22d last, included only lands in the twenty mile (granted) limits and the first or thirty mile indemnity limits.

I enclose a diagram showing the limits of said withdrawal and the additional forty-mile or second indemnity limits (shown by lines shaded red), and pursuant to the instructions of the Hon. Secretary you are directed to withdraw from sale or entry all the odd-numbered sections falling within said forty mile limits, which should be laid down on the diagrams sent you June 22nd. 398

This order will not affect the rights of other companies for which withdrawals of land in said limits have been ordered, neither will it change the status of the even-numbered sections falling in said limits. Report promptly the date of receipt by you of this order and the accompanying diagram.

Very respectfully,
N. C. McFARLAND,
Commissioner."

XLI.

That thereafter, and on the 28th day of August, A. D. 1884, the board of directors of the Northern Pacific Railroad Company adopted the following resolution, to-wit:

"Resolved, That the eastern terminus, or the point of beginning 399
of the Northern Pacific Railroad on Lake Superior, be, and the same is hereby fixed, determined and established at a point at the city of Ashland, on Lake Superior, in the county of Ashland, in the state of Wisconsin, in section 27, township 48 north, range 4 west, of the fourth principal meridian."

That thereafter, and on or about the 3rd day of December, 1884, the said Northern Pacific Railroad Company transmitted a copy of

said resolution, duly certified by its secretary under the corporate seal of said company, to the commissioner of the general land office.

XLII.

That thereafter the commissioner of the general land office prepared a diagram showing the final eastern terminal limit of said line, of which Exhibit "7" filed herewith is a true copy, and transmitted
400 the said diagram to the United States district land officers at Ashland, Wisconsin, together with a letter of instructions in the words and figures following, to-wit:

"Washington, D. C., Feb. 3, 1887.

Register and Receiver,
Ashland, Wisconsin.

Gentlemen: By office letter of September 15, 1870, addressed to the local officers at Bayfield, Wisconsin, a withdrawal of lands in their district was ordered for the benefit of the Northern Pacific Railroad Company, under act of July 2, 1864, (13 Stat. 365), which withdrawal has been known as the withdrawal on general route, i. e., a withdrawal ordered upon a map filed as map of general route.

July 6, 1882, the president of said company (Henry Villard, Esq., of New York City) filed a map purporting to be a map of
401 definite location showing that part of the road definitely located in the state of Wisconsin, whereupon this office, by letter of January 5, 1883, transmitted to the register and receiver at Bayfield, a diagram showing the limits of the grant in their district as adjusted to the definite location of the road whereby additional lands were withdrawn, and the price of some lands falling outside of the 20 mile limits of definite location but which were within the twenty mile limits on the general route, were reduced in price to $1.25 per acre.

By letter of December 3, 1884, George Gray, Esq., general counsel of the Northern Pacific Railroad Company, transmitted to this office a duly certified copy of a resolution adopted by the board of directors of said company at a meeting held Aug. 28, 1884, as follows, to-wit:

"Resolved, That the eastern terminus or the point of beginning
402 of the Northern Pacific Railroad on Lake Superior, be, and the same is hereby fixed, determined and established at a point at the city of Ashland, on Lake Superior, in the county of Ashland, in the state of Wisconsin, in section 27, township 48 north, range 4 west of the fourth principal meridian."

The eastern terminus of the line of the Northern Pacific Railroad having thus been determined and established, I have caused to

be prepared a diagram showing the final eastern terminal limit of the grant to said company as fixed by this office.

A copy of said diagram is herewith enclosed; it also shows the limits of the aforesaid withdrawals in your district east of range 5 west.

The terminal limit having thus been definitely fixed, all lands east thereof are released from the operation of all withdrawals for the Northern Pacific Railroad Company, but as the same are within 403
the limits of a prior withdrawal for the Wisconsin Central Railroad Company, the odd-numbered sections will not, of course, be restored to entry. The even-numbered sections east of said terminal limits which have heretofore been withdrawn as within the 20 mile granted limits of the N. P. R. R. will be held at $1.25 per acre where same are not double minimum by reason of being within the granted limits of the Wisconsin Central Railroad.

Please acknowledge receipt thereof.

Respectfully,

WM. A. J. SPARKS,

Commissioner.

XLIII.

That section 27, township 48 north, range 4 west of the fourth 404
principal meridian, fixed by the resolution of the board of directors of the Northern Pacific Railroad Company as set out in the XLI. paragraph of this stipulation as the initial point of said railroad, is about one mile from the line of the definite location of said railroad as shown by the map thereof filed in the office of the commissioner of the general land office on the 6th day of July, 1882, a copy of which said map is Exhibit "6" of this stipulation; that said line runs through the southern half of section 34, which lies directly south of section 27, and said point at Ashland, as stated in said resolution, is situated about twelve (12) miles west of the most easterly point of said map of definite location filed on the 6th day of July, 1882.

XLIV.

405

That the said Northern Pacific Railroad Company constructed its line of road by commencing, in the year 1870, at Thomson Junction on the line of the Lake Superior and Mississippi Railroad, and constructing the same thence west, under the act of July 2, 1864, to a point fifty-five miles west of the city of Helena, Montana, and thereafter said railroad was constructed eastward from Wallula Junction a point in the territory now state of Washington, east

of the Cascade mountains, to said point fifty-five miles west of the city of Helena; that said line so constructed west from said village of Thomson and said line so constructed east from said Wallula Junction met and were united at said point fifty-five miles west of the city of Helena in the month of August, 1883; that in the years 1873 and 1874 the Northern Pacific Railroad Company constructed a line in the then territory of Washington from Kalama to Tacoma
406 on Puget Sound and in the year 1884 extended the same from Kalama to Portland, in the state of Oregon. That said line from Tacoma to Portland was constructed under the provisions of two certain joint resolutions of congress, approved respectively April 10, 1869, and May 31st, 1870. That no line was ever constructed by said company along the valley of the Columbia river from said Wallula Junction to the line from Portland, Oregon, to Kalama, Washington; that during the year 1882 the company began the construction of its road eastward from Thomson Junction and constructed the same to Bluff Creek, in the city of Superior, on Lake Superior, in the state of Wisconsin, as shown by the report of construction set out in paragraph (XLV.) hereof, and that thereafter and prior to 1885 said company constructed the portion of its road eastward from said Bluff Creek to the city of Ashland, on Lake Superior, as shown in
407 the reports of construction thereof set out in paragraph (XLV.) hereof; that thereafter and during the years 1885, 1886 and 1887, said Northern Pacific Railroad Company constructed its line from a point on said line theretofore constructed about sixteen miles north of said Wallula Junction, over and across the Cascade mountains, to the city of Tacoma, in the territory now state of Washington, on Puget Sound, that said line from Wallula Junction to Tacoma was completed in the month of August, 1887, and the whole of said line of railroad was accepted by the president of the United States as provided in said act of congress of July 2, 1864.

XLV.

That the portion of said railroad extending from said point at the city of Ashland to said Thomson Junction, in the county of Carlton, in said state of Minnesota, was constructed on said line of
408 definite location so fixed as aforesaid and shown on Exhibit 2 during the years 1881, 1882, 1883 and 1884, and was examined in three sections by commissioners appointed by the president of the United States as provided in said act of congress of July 2, 1864.

That the first of said sections so examined by said commissioners extended from said Thomson Junction, in the state of Minnesota, to a point on Bluff Creek, within the corporate limits of

Superior City, in the state of Wisconsin, a distance of 25 miles; that said section was constructed in the years 1881 and 1882. That the said commissioners, after examining the said section of railroad extending from said Thomson Junction to said Bluff Creek, duly reported to the secretary of the interior that the same was constructed in compliance with said act of congress of July 2, 1864, and thereupon the secretary of the interior, on the 14th day of September, 1882, transmitted said report of said commissioners to the president of the United States together with a letter recommending that said report be approved and said last mentioned section of said railroad be accepted by the president according to the provisions of the said act of congress of July 2, 1864. That said letter so transmitted by the secretary of the interior with said report of said commissioners is in the words and figures following, to-wit: 409

"Washington, 14th Sept., 1882.

Sir: I have the honor to submit herewith the report of Messrs. Harvey W. Scott, John P. Sanborn and Arthur B. Johnson, whom you appointed commissioners to examine two hundred and twenty-five miles of the Northern Pacific Railroad. They report said sections (two hundred miles in the territory of Montana, beginning at a point on the south bank of the Yellowstone river about one and a half miles west of O'Fallon's creek, and ending at a point on the west bank of Cannon Creek, seven miles west of the town of Billings, in Sec. 22, T. 1 S., R. 25 E., Montana meridian; and twenty-five miles beginning at the Northern Pacific Junction near Thomson, Minnesota, and ending at or near Bluff Creek, in Superior, Wisconsin), as constructed in substantial compliance with the requirements of law and the instructions of this department; and the same of the telegraph line along said sections of railroad. 410

I therefore recommend that you accept said two hundred and twenty-five miles of railroad and that patents for lands earned by its construction be issued to the Northern Pacific Railroad Company, on their complinace with the law in such cases made and provided, and with the decision of this department of the 5th of June last.

Very respectfully,

H. M. TELLER, 411

Secretary.

The President."

That thereupon the president of the United States considered the report of said commissioners and said recommendation thereon of the secretary of the interior, and thereupon, and on the 16th day of September, 1882, approved said recommendations and endorsed

his approval thereon, in writing, in the words and figures following, to-wit:

"Executive Mansion, September 16th, 1882.

The within recommendations are approved.

CHESTER A. ARTHUR."

That the second of said sections so examined by said commissioners extended from said Bluff Creek, a point in the town of Su-
412 perior, Wisconsin, in the northeast quarter of section thirty-two (32), township forty-nine (49) north, of range thirteen (13) west, eastwardly to a point about three-fourths of a mile east of Brule river, in the southwest quarter of section thirteen (13), township forty-seven (47) north, of range ten (10) west of the fourth principal meridian, Wisconsin, a distance of twenty-five miles; that said second section was constructed in the latter part of the year 1883, that the said commissioners after examining the said section of said railroad, duly reported, in writing, to the secretary of the interior on the 30th day of January, 1884, that said section was constructed in compliance with said act of congress of July 2, 1864, and the secretary of the interior transmitted said report of said commissioners to the president of the United States, together with a letter recommending that said report be approved and said last mentioned
413 section of said railroad be accepted by the president according to the provisions of the said act of congress of July 2, 1864. That said letter so transmitted by the secretary of the interior, with said report of said commissioners, is in words and figures following, to-wit:

"Washington, 30th January, 1884.

Sir: I have the honor to submit herewith the report of Messrs. Hezekiah Watkins, Frank H. Truesdell and John C. Wyman, whom you appointed commissioners to examine twenty-five miles of the Northern Pacific Railroad and Telegraph Line in Wisconsin.

Said section begins in the town of Superior Wisconsin, at a point in the NE¼ of section 32, T. 49 N., R. 13 west, runs eastwardly and ends at a point about three-fourths of a mile east of Brule river, in the SW¼ of section 13, T. 47 N., R. 10 W. of fourth principal meridian, Wisconsin.

414 The commissioners report said section as constructed in substantial compliance with law and the instructions of this department. I therefore recommend that you accept said section, and that patents for lands earned by its construction be issued to the Northern Pacific Railroad Company, on their compliance with the laws and regulations in such cases provided.

Very respectfully,

H. M. TELLER, Secretary.

The President."

That thereupon the president of the United States considered the report of said commissioners and said recommendation thereon of the secretary of the interior and thereupon, and on the 31st day of January, 1884, approved said recommendations and endorsed his approval thereon, in writing, in the words and figures following, to-wit:

"Executive Mansion, January 31, 1884.

The within recommendations are approved. 415

CHESTER A. ARTHUR."

That the third of said sections so examined by said commissioners extended from the town of Ashland, Wisconsin, a point on Lake Superior, in section twenty-seven (27), township forty-eight (48) north, of range four (4) west of the fourth principal meridian, westwardly to a point in the southwest quarter of section thirteen (13), township forty-seven (47) north, of range ten (10) west, same meridian, Wisconsin, a distance of thirty seven and one-half miles; that said third section was constructed in the year 1884. That the said commissioners, after examining the said section of said railroad, duly reported to the secretary of the interior that the same was constructed in compliance with said act of congress of July 2, 1864, and thereupon the secretary of the interior, on the 6th day of Feb- 416 ruary, 1885, transmitted said report of said commissioners to the president of the United States, together with a letter recommending that said report be approved and said last mentioned section of said railroad be accepted by the president according to the provisions of the said act of congress of July 2, 1864. That said letter, so transmitted by the secretary of the interior with said report of said commissioners, is in the words and figures following, to-wit:

"Washington, 6th February, 1885.

Sir: I have the honor to submit herewith the report of Messrs. C. G. Barber, Nathan G. King and George B. Welsh, whom you appointed commissioners to examine a section of thirty-seven and one-half miles of the Northern Pacific Railroad and Telegraph Line in Wisconsin.

Said section begins near the town of Ashland, in Sec. 27, T. 48 417 N., R. 4 W., 4th principal meridian, runs westwardly and ends at a point in the SW¼ of Sec. 13, T. 47 N., R. 10 W., same meridian, Wisconsin.

The commissioners report said section as constructed in substantial compliance with law and the instructions of this department. I therefore recommend that you accept said section, but that

no patents for lands lying coterminous with said section shall issue until specific orders so to do be given by you.

Very respectfully,

H. M. TELLER,

Secretary.

The President."

That thereupon the president of the United States considered
418 the report of said commissioners and said recommendation thereon of the secretary of the interior and thereupon and on the 16th day of February, 1885, approved said recommendation and endorsed his approval thereon, in writing, in the words and figures following, to-wit:

"Executive Mansion, February 6, 1885.

The within recommendations are approved.

CHESTER A. ARTHUR."

XLVI.

That Exhibit "2" filed herewith and made a part hereof shows the line of route of the Lake Superior and Mississippi Railroad extending from a point in township 47 north, of range 18 west of the 4th principal meridian in Minnesota, to Duluth, as constructed prior
419 to January 1, 1872.

XLVII.

That in the month of February, A. D. 1873, the directors of the Northern Pacific Railroad Company were informed that claim was made by the officers of the Lake Superior and Mississippi Railroad Company that the effect of that certain agreement set forth in the bill of complaint herein, and admitted by the answer, which was entered into between the said Lake Superior and Mississippi Railroad Company and the defendant, the Northern Pacific Railroad Company, on the first day of January, 1872, whereby the said Lake Superior and Mississippi Railroad Company conveyed to the said Northern Pacific Railroad Company a half interest in that portion of its road extending from Thomson Junction to Duluth, was to fix the
420 eastern terminus of said Northern Pacific Railroad at Duluth; and thereupon, by resolution duly adopted on the 13th day of February, 1873, the said directors of the said Northern Pacific Railroad Company called upon the said Lake Superior and Mississippi Railroad Company for an agreement construing the said agreement of January 1, 1872, so that the same should not be held to intend, or have intended to fix the eastern terminus of the Northern Pacific Railroad at Duluth, and thereafter, and on the 2nd day of June, 1873, the said

Lake Superior and Mississippi Railroad Company, by resolution of its board of directors duly adopted on that day, agreed with the said Northern Pacific Railroad Company that said agreement of January 1, 1872, should not be held to intend, or have intended, that the eastern terminus of the Northern Pacific Railroad should be, or was by virtue of the said agreement of January 1, 1872, so established at Duluth, Minnesota.

421

XLVIII.

That on the 21st day of April, 1874, the said Northern Pacific Railroad Company and the said Lake Superior and Mississippi Railroad Company entered into an agreement in writing, executed by the duly authorized officers of said two companies respectively, by the terms whereof the said Northern Pacific Railroad Company surrendered all rights inuring to the said Northern Pacific Railroad Company under said contract of lease of May 1, 1872, mentioned in the said bill of complaint herein, a copy whereof is attached to said bill of complaint and marked "Exhibit B1." That said agreement so executed on the 21st day of April, 1874, is in the words and figures following, to-wit:

"THIS AGREEMENT, Made the 21st day of April, eighteen 422
hundred and seventy-four, by and between the Northern Pacific Railroad Company, a corporation created and existing by and under the laws of the United States, party of the first part, and the Lake Superior and Mississippi Railroad Company, a corporation created and existing under certain laws of the former territory and present state of Minnesota, party of the second part. Witnesseth.

Whereas, By an indenture bearing date the first day of May, eighteen hundred and seventy-two, made by and between the parties hereto, the said party of the second part did grant, demise and lease unto the said party of the first part, for the term of nine hundred and ninety-nine years, the railroad of the said party of the second part, situate and being in the state of Minnesota, together with the lands occupied thereby and connected therewith, and the equipments of said railroad belonging to the said party of the second part, and all rights, privileges, and franchises of the said party of 423
the second part, necessary to the operation and management of said railroad and the business thereof; and in and by the same indenture the said party of the second part assigned to the said party of the first part a certain lease and agreement bearing date the first day of November, eighteen hundred and seventy, made by the Stillwater and St. Paul Railroad Company to the said party of the second part; and also two other leases and agreements, one made by the Minne-

apolis and Duluth Railroad Company and the other by the Minneapolis and St. Louis Railroad Company, to the said party of the second part, which two last mentioned leases and agreements were by an instrument in writing dated on the 29th day of November, 1873, reassigned by the said party of the first part to the said party of the second part;

And Whereas, The said parties have mutually agreed that the
424 lease bearing date the first day of May, 1872, made by the said party of the first part, as aforesaid, and the estate, right, title and interest thereby granted, demised and let, be terminated; and the said lease and agreement made by the Stillwater and St. Paul Railroad Company to the said party of the second part, and assigned to the said party of the first part be reassigned to the said party of the second part, and that said termination and reassignment shall take effect, and be, as of the first day of February last.

And Whereas, Sundry parol agreements have been heretofore made by and between the said parties touching the use, occupation and connections of their respective railroads, and appurtenances, and certain arrangements are deemed proper just and expedient in consideration of the surrender and reassignment of the leases aforesaid, which should now for greater certainty, be put into writing
425 duly executed, under the corporate seals of the parties.

Now, Therefore, It is further covenanted and agreed by and between the said parties, that for and in consideration of the covenants, promises and agreements hereinafter contained, on the part of the said party of the second part to be kept, fulfilled and performed, the said party of the first part has surrendered and relinquished to the said party of the second part the said indenture of lease bearing date the first day of May, eighteen hundred and seventy-two, made by and between the said parties, and the railroad premises, property and franchises, therein and thereby let, leased and demised; and has reassigned and transferred to the said party of the second part the said lease and agreement made by the Stillwater and Saint Paul Railroad Company, and the railroad and the property therein described; and the said party of the second part has accepted the said surrender and relinquishment of the said lease made by the said
426 party of the second part to the said party of the first part, and the railroad premises, property and franchises therein and thereby let, leased and demised; and has also accepted the said reassignment and transfer of the said lease and agreement made by the Stillwater and Saint Paul Railroad Company, and the railroad and property therein described.

And it is hereby mutually covenanted, promised and agreed by and between the said parties that the said surrender and relinquish-

ment, reassignment and transfer, and the acceptance thereof, as aforesaid, were made as of the first day of February, eighteen hundred and seventy four, and shall and will, in all respects, and for all purposes, be deemed and taken to have been made, and have the same force and effect as if made on that day, and that the relation between the said parties of lessor and lessee did on that day wholly cease and determine.

And the said party of the first part hereby covenants, promises 427
and agrees to and with the said party of the second part, that it will well and truly save, indemnify and keep harmless the said party of the second part, its successors and assigns, of and from all loss, damage, costs, claim, demand, action or forfeiture, that may have in any manner accrued, arisen, grown or been incurred in the operation or management of the said leased lines of railroad hereby surrendered and restored to the said party of the second part, by reason, or on account of, any act, neglect, or omission by, or on the part of the said party of the first part, its officers, agents or servants, between the first day of May, 1872, and the first day of February 1874.

And the said party of the first part further agrees that, as soon as practicable, it will render an account to the said party of the second part of the business and operation of the said railroad of the said party of the second part, and of the said railroad of the 428
Stillwater and Saint Paul Railroad Company from, and including, the first day of February, 1874, to the day when the said party of the first part shall cease to operate said last named railroads for the said party of the second part after the execution and acknowledgment of this agreement; and it is hereby mutually covenanted, promised and agreed by and between the said parties, that in case the earnings of said last mentioned railroads exceed the expenses of running, maintaining and operating the same, during the period last above mentioned, the said party of the first part will allow to the said party of the second part the amount of such excess; and in case the said earnings shall fall short of said expenses, the said party of the second part shall pay to the said party of the first part the amount of such deficiency.

And it is further mutually covenanted, promised and agreed by
and between the said parties, that all wood and other railroad sup- 429
plies on hand, belonging to the said party of the first part when said party of the first part shall cease to operate said last named railroad for the said party of the second part in use, or intended for use thereon, shall be taken and purchased by the said party of the second part and the said party of the second part shall pay the said party of the first part therefor in cash the appraised value thereof as the same shall be jointly appraised, agreed and determined by J. P. Illsley,

president of the said party of the second part, and C. W. Mead, general manager of the Northern Pacific Railroad.

And it is further mutually covenanted, promised and agreed by and between the parties hereto, that inasmuch as the said party of the first part has heretofore made and entered into, and shall and may hereafter make and enter into, contracts and agreements for the transportation of freight between the city of St. Paul and various places on the Northern Pacific Railroad by the way of the railroad of the said party of the second part, the charges for the transportation of freight on all such contracts heretofore made, and that may hereafter be made, shall, when collected, be apportioned pro rata between the parties hereto, as follows: That is to say, for the transportation of freight, either way between Saint Paul and Bismarck the said party of the second part shall be entitled to one-fifth, and the said party of the first part four-fifths of the charges collected for such transportation; between Saint Paul and Fargo or Moorhead, either way, the said party of the second part shall be entitled to one-third, and the said party of the first part to two-thirds of the charges collected for said transportation; and the allowance and apportionment to the said party of the second part of charges for the transportation of freight, either way, between Saint Paul and any other place or places than those above named, on the Northern Pacific Railroad, shall not exceed the pro rata of mileage of such transportation; and this agreement for the apportionment of charges for transportation shall apply as well to freight consigned from beyond the places above named as to the local freights. And it is further agreed that the said party of the second part its officers, agents and servants, will at all times until the expiration of the year 1874, recognize, and treat as valid all passes heretofore, issued by the general manager of the said Northern Pacific Railroad, now in force, for the free carriage of persons over the said Northern Pacific Railroad and leased lines, and will give to the person and persons having and entitled to have such passes free carriage over the railroads of the said party of the second part and its leased roads until the expiration of the present year.

And the said party of the second part in consideration of the premises, and of one dollar to it paid by the said party of the first part, and for divers other good and valuable considerations it thereunto moving, does hereby covenant, grant, promise and agree to and with the said party of the first part, its successors and assigns, that the said party of the first part, its successors and assigns, shall and may, in the customary manner as to construction and maintenance, have the right forever to connect that certain railroad and railroad track constructed and laid by the said party of the first part in and

along Dock Street, in the city of Duluth, in the county of Saint Louis and state of Minnesota, with the main line and track of the railroad of the said party of the second part at the place where the same now connect, opposite or nearly opposite the foot of First avenue east in said city of Duluth, and said connection forever to keep, have and enjoy; and also the perpetual right to use, in common with the said party of the second part, so much of the main track, switches and sidings of the said railroad of the said party of the 433
second part from said point of connection, northeastwardly, as may be necessary for the proper and reasonable movement and management of locomotives, cars and trains, in transferring the same from the one to the other of said railroads, and also the perpetual right to use, in common with the said party of the second part, so much of the main track of the railroad of the said party of the second part, and its switches and sidings, as extend from said point of connection to and across the center line of Lake Avenue, in said City of Duluth, that being the termination of that part of the said main line of railroad jointly owned by said parties hereto, according to the deed upon condition heretofore made by and between said parties and bearing date the first day of January, A. D. 1872.

And the said party of the second part, in consideration of the premises and for the other considerations hereinafter mentioned and 434
referred to, does hereby further covenant, grant, promise and agree to and with the said party of the first part that it, the said party of the first part, its successors and assigns, shall have the right, forever, to use, operate and enjoy, without payment or charge therefor, in common with the said party of the second part, the railroad track now constructed and laid from the main line of the Lake Superior and Mississippi Railroad near the round-house in said city of Duluth, to, down and along the southwest side of Rice's Point, together with the appurtenances thereto belonging, or therewith connected; and, further, that the said party of the first part, its successors and assigns, shall have the exclusive right to possess, use occupy and enjoy the building and stalls and each and every of them, with their appurtenances, easements and appliances, erected, constructed and furnished by the said party of the first part, at the round-house aforesaid, and the right of ingress and egress to and from the same, 435
until the expiration of twelve months notice to be given by the said party of the second part, its successors and assigns, that it or they require the use thereof for itself or themselves, and until the said party of the second part, its successors or assigns, shall have fully paid to the said party of the first part, its successors or assigns, the then value of said building, stalls and appurtenances and appliances as aforesaid.

And, Inasmuch as the said party of the first part has paid, laid out and expended large sums of money for, in and about the construction of the canal across Minnesota Point, at said city of Duluth, and the improvement of the harbor of Duluth, one-half of which was, and is, by agreement heretofore made by and between the said parties, to be paid by the said party of the second part; Now, therefore, The said party of the second part, in consideration thereof, and of
433 the hereinbefore recited premises and for the other considerations aforesaid, does hereby covenant, promise and agree to and with the said party of the first part, that it, the said party of the second part, its successors or assigns, shall and will, well and truly and faithfully, pay to the said party of the first part, its successors or assigns, one-half the entire cost of the said canal and harbor improvement, said payment to be made as follows: that is to say, a sum of money equal to one-fourth of the execution of this agreement, and the remainder being a sum of money equal to one-fourth of the entire amount of said cost, to be paid when the said party of the first part shall vacate that portion of the Dock street front on the Bay of Duluth, between the center line of Ninth Avenue West, produced, and the southwest line of Fifth Avenue West, produced, as hereinafter agreed to be vacated by the said party of the first part.

437 And whereas, The said party of the first part, while the said indenture of lease bearing date the first day of May, 1872, was in full force and the said party of the first part was lawfully seized of the estate thereby granted and demised, did make an agreement to let and lease, and did lease to Munger Brothers of Duluth, aforesaid, certain of said lands and premises, situated and being in the said city of Duluth, for the purpose of erecting thereon an elevator and a flouring mill, and described as follows, viz: that certain piece or parcel of land and premises extending from Dock Street, southeasterly into the Bay of Duluth, and bounded on the northeast by the southwest line of Fourth Avenue West, produced into the bay, and on the southwest by the southeast line of First Avenue West produced into the bay, together with the water rights and appurtenances thereto belonging and whereon the said Munger Brothers have constructed an elevator; Now, therefore, for the purpose of
438 confirming said lease to the said Munger Brothers, the said party of the second part does hereby covenant, grant, promise and agree to and with the said party of the first part, that it, the said party of the first part, its successors and assigns, shall and may have and enjoy, without charge, cost or payment therefor, the exclusive rights, possession, occupancy and control to and of the said lands and premises last above described with the said rights and appurtenances thereto belonging for and during the term and terms for which the same

have been leased or agree to be leased to the said Munger Brothers, as aforesaid, and to have, receive, possess and enjoy the rents, issues and profits thereof during that period; Provided always, And upon conditions that said lands and premises, and no part thereof, shall be used or occupied for any other than for elevator and flouring mill purposes, and business properly and reasonably belonging thereto or connected therewith.

And the said party of the second part, for the considerations 439
hereinbefore expressed and referred to, does hereby further covenant, grant, promise and agree to and with the said party of the first part that it, the said party of the first part, its successors and assigns, shall and may have, hold, possess, occupy and enjoy forever, without cost, charge or payment therefor, the right of way on and over the lands and premises owned by the said party of the second part, or in or to which it now has or may hereafter acquire, any interest, right or title, legal or equitable, in common or in severalty from Third Street of Rice's Point Division of said city of Duluth, along the line of the railroad constructed by the said party of the first part, commonly known as the Dock Street track, to its connection with the main line of the railroad of the said party of the second part at or near the foot of First Avenue East, said right of way to extend to the width sufficient for a double track railroad with 440
the necessary appurtenances along and including the present single track of said railroad known as the Dock Street track.

And it is hereby mutually covenanted, promised and agreed by and between the parties hereto, that the single railroad track now laid through Dock Street, from its connection with the main line of the said Lake Superior and Mississippi Railroad near Twenty-first Avenue West, in said city of Duluth, to its connection with said main line at or near the foot of First Avenue East, shall be common to both the parties hereto, and their respective successors and assigns, so soon as the said party of the second part, its successors and assigns, shall pay to the said party of the first part, its successors or assigns, one-half the value thereof, at the time of such payment; and when said payment shall be made the said party of the first part, its successors or assigns, shall, on the written request of the said party of the second part, its successors or assigns, execute 441
and deliver to it or them such further instrument or instruments as may be reasonably devised, advised or required by the said party of the second part, its successors or assigns, or by its or their counsel learned in the law, to secure, assure and confirm to the said party of the second part, its successors or assigns, forever, the right to use the said track of the said Dock Street railroad, in common with the said party of the first part, its successors and assigns.

And Whereas, The said party of the first part has made, constructed and erected valuable and permanent improvements on the Bay of Duluth in front of that part of Dock Street in said city of Duluth hereinafter particularly described according to the agreement and understanding heretofore made and existing by and between said parties in relation thereto, it is hereby mutually covenanted, promised and agreed by and between said parties, that the
442 said party of the first part, its successors or assigns, shall vacate, quit and surrender to the said party of the second part, its successors or assigns, the said Dock Street front last above mentioned, and particularly described as follows: That is to say, all the land and premises extending from said Dock Street into the Bay of Duluth, and bounded on the northeast by the southwest line of Fifth Avenue West, produced into the bay, and on the southwest by the center line of Ninth Avenue West produced into the bay, at the expiration of twelve months' notice in writing by the said party of the second part, its successors or assigns, to the said party of the first part, its successors or assigns, to vacate, quit and surrender the same and, on the full payment by the said party of the second part, its successors or assigns, of the then value of all improvements made on said last above described premises by the said party of the first
443 part, and that shall have been made thereon by the said party of the first part, its successors or assigns.

And that the said party of the first part, its successors or assigns, shall and may have the exclusive quiet possession, control, occupancy and enjoyment of all said last above described premises without cost, charge or payment therefor until the expiration of said notice to vacate, quit and surrender the same, and until full payment of the then value of said improvements as aforesaid.

And the said party of the second part, in consideration of the premises, does hereby covenant, promise and agree to and with the said party of the first part, that if the said party of the first part is released and discharged since the first day of February, eighteen hundred and seventy-four, from all claim and demand for, or on account of the rental provided for in said indenture made by and between the parties hereto, bearing date the first day of May, A. D.
444 1872, and from all the covenants, promises and agreements in said indenture of lease contained on the part of the said party of the first part hereto to be performed, kept and fulfilled and from all claim, demand and liabilities whatever, by reason or on account or growing out of the said indenture bearing date the first day of May, 1872, or of anything therein contained.

In witness whereof, The parties hereto have caused their respective corporate seals to be hereunto affixed, and the same and these

presents to be attested by the signatures of their respective presidents and secretaries, the day and year first above written.

G. W. CASS,
President of the Northern Pacific Railroad Company.
(Corporate Seal.)

SAM'L WILKESON,
Secretary of the Northern Pacific Railroad Company.

Signed, sealed and delivered in presence of 445
A. L. PRITCHARD.
GEORGE FOLLETT.

JOHN P. ILLSLEY,
President of the Lake Superior and Mississippi Railroad Company.
(Corporate Seal.)

THOS. M. DAVIS,
Secretary of the Lake Superior & Mississippi Railroad Company.

Signed, sealed and delivered in presence of
FRANK H. CLARK,
EDW'D ELDREDGE.
(Here follows certificate of acknowledgment.)"

XLIX. 446

That thereafter, pursuant to said indenture of release so executed on the said 21st day of April, 1874, the said Northern Pacific Railroad Company surrendered and delivered over to the Lake Superior and Mississippi Railroad Company all lines of railroad so leased by said contract of May 1, 1872.

That the said Northern Pacific Railroad Company operated the said line of railroad extending from Thomson Junction to Duluth in which the said Northern Pacific Railroad Company acquired a half interest by said deed of conveyance of January 1, 1872, from said Lake Superior and Mississippi Railroad Company and continued to run its trains over said line of railroad for a period of about fourteen years, to-wit: from the 1st day of January, 1872, to about the 1st day of January, 1886, but that in the year 1881 the said line from Thomson Junction to Duluth was abandoned by said Northern Pa- 447
cific Railroad Company and has since been unused by said Northern Pacific Railroad Company.

That the Northern Pacific Railroad Company has never claimed to be entitled to receive any lands from the United States on account of said line of railroad extending from Thomson Junction to Duluth: and has never received any lands whatsoever on account of said line.

L.

That lot 5, section 29, township 54 north, of range 13 west of the 4th principal meridian is situated east of the city of Duluth, Minnesota, and of Superior City, Wisconsin, and west of the city of Ashland, Wisconsin, and is situated opposite to and more than twenty but less than thirty miles distant from the second of said three sections of railroad so constructed as aforesaid from Thomson Junction
448 to the City of Ashland; and more than twenty but less than thirty miles distant from said line of definite location of said railroad as indicated upon said map so filed in the office of the commissioner of the general land office on the 6th day of July, 1882.

LI.

That said lot 5, of section 29, township 54 north, of range 13 west of the 4th principal meridian, was, on the 5th day of October, 1894, except for the claim of the Northern Pacific Railroad Company, public land of the United States free and clear from any claims or rights, and on said 5th day of October, 1894, the said Northern Pacific Railroad Company filed in the United States district land office at Duluth, in the state of Minnesota, a certain selection list in
449 the form required by law and the rules and regulations of the Interior Department whereby the said Northern Pacific Railroad Company selected said lot 5, above described, and claimed the same under the provisions of its said grant as a tract of land inuring to said company in lieu of an equal quantity of land in section 1, township 51 north, range 13 west of the 4th principal meridian, which said section 1 would be within the place or granted limits of its said grant, if the same is to be held to extend to the east of Superior City, in the state of Wisconsin, but not otherwise which said section 1 was reserved, appropriated and lost to said company at the date of the definite location of said line of railroad, if the grant appertains to the portion of the road opposite thereto; and that thereafter, and on the 13th day of April, 1895, the said selection was approved by the secretary of the interior and on the 22nd day of April, 1895, let-
450 ters patent of the United States were issued to the said Northern Pacific Railroad Company conveying to said company the said lot five (5), of section twenty-nine (29), in township fifty-four (54) north, of range thirteen (13) west of the fourth principal meridian, and that the patent issued to the Northern Pacific Railroad Company on the 22nd day of April, 1895, which included said lot 5, did not include any other land east of the terminal limit established by the land department of the United States at Duluth, Minnesota, nor has any

patent issued to said company under its grant before or since April 22, 1895, including any other land than said lot 5 lying to the east of said terminal limit as established by the land department of the United States at Duluth, Minnesota, that on said 22nd day of April, 1895, there was pending in the office of the secretary of the interior a certain list submitted by the commissioner of the general land office with his letter of March 17, 1894, which included a tract selected in lieu of a part of an odd numbered section lying within 451
twenty miles of the line of definite location of said road to the east of Duluth.

LII.

That there was included within the same patent by which said lot five (5), of section twenty-nine (29), township fifty-four (54) and range thirteen (13) was conveyed as hereinbefore set forth, another tract of land containing forty (40) acres, to the west of the terminal established at Duluth, Minnesota, but which was selected by the Northern Pacific Railroad Company in lieu of a tract of equal area claimed to have been excepted from its grant, which said tract so specified as a basis of said selection was situated in the state of Minnesota, to the east of said terminal established at Duluth, Minnesota, 452
and opposite to and less than twenty (20) miles distant from the line of said railroad as located and constructed from said Thomson Junction eastward to the City of Ashland, that on the said 22nd day of April, 1895, a second patent was issued to the Northern Pacific Railroad Company whereby there was conveyed to said company fourteen (14) tracts of land aggregating 906.41 acres, situated in the state of Minnesota, to the west of the terminal established at Duluth, Minnesota, all of which said tracts had been selected by said company in lieu of an equal number of tracts of equal area situated to the east of said terminal established at Duluth, Minnesota, and opposite to and coterminous with that portion of its said line of railroad extending east from Thomson Junction to the city of Ashland and less than twenty miles distant from said road so located and constructed and claimed by said company to have been excepted from its said grant: that prior to the issuance of said patent no other 453
bases for said selection had been specified by said company or required by the land department of the United States.

That the line of said road, as located and constructed between Thomson Junction and the city of Ashland, is about 87½ miles in length and opposite to and coterminous with the same the lands situated within 20 miles of said line of railroad designated by odd numbers amount to about 1,408 sections, or about 901,257 acres; that the

total area of land situated opposite to and coterminous with said line of railroad so located and constructed from Thomson Junction to the city of Ashland contained within the odd numbered sections situated within twenty miles of said line of railroad which were on July 6, 1882, public lands of the United States, free and clear from pre-emption or other claims or rights, amounted to less than eight (8) sections, or 5,120 acres; that for those sections situated within
454 twenty miles of said line of railroad, designated by odd numbers and which were not free and clear from pre-emption or other claims or rights on July 6, 1882, the company, if its land grant extends along the line of said railroad from Thomson Junction to the city of Ashland, is authorized to select indemnity from the indemnity limits opposite thereto or elsewhere within the indemnity limits along the line of its road as located or constructed to the west of Thomson Junction; that the railroad company has indemnity selections now pending before the land department of the United States amounting to 52,546.64 acres, or a little more than eighty-two full sections of land, situated within the first and second indemnity belts opposite the road as located and constructed from Thomson Junction to the city of Ashland; that no patents for land within the indemnity limits of the Northern Pacific grant in the state or territory of Mon-
455 tana were issued to said company prior to November 7, 1895.

That the Northern Pacific Railroad Company has never at any time presented any list or lists to the land department of the United States claiming any lands situated opposite to and coterminous with the line of railroad extending from Thomson Junction to the city of Duluth as inuring to it under its said grant by act of congress of July 2, 1864, which were not situated opposite to and coterminous with the said line of railroad so located and constructed from Thomson Junction to the city of Ashland.

That the terminal limit established at Duluth mentioned in this and the next preceding paragraph of this stipulation was established pursuant to the decision of the secretary of the interior contained in his letter to the commissioner of the general land office, dated August 27, 1896, and October 29, 1896.

456

LIII.

That prior to the filing of the map referred to and made a part of stipulation number XXXI., Edwin F. Johnson, the engineer-in-chief of the Northern Pacific Railroad Company, wrote and forwarded to the commissioner of the general land office two certain letters, bearing date February 16, 1869, and May 24, 1869, respectively, which are in the words and figures following, to-wit:

"Washington, D. C., Feb. 17th, 1869.

HON. JOS. S. WILSON,

Commissioner Gen'l Land Office.

Dear Sir: The Northern Pacific R. R. Company, not obtaining the reasonable aid asked for from the government beyond their grant of lands, must, in their efforts to construct their road, make the most of the latter grant, and in doing so must so locate their road as to secure as large an amount as possible of so much of the government lands as are available, and to guide them to this result, I am requested by the company to obtain from your office a statement of the lands available covered by the government land surveys in Wisconsin and Minnesota and the territories west to the Pacific between the parallels of 45 and 49 degrees north. 457

The company also desires copies of the rules to be observed by railroad companies having land grants, etc., as prepared by your department.

The portions of the territory first desired, if all can not be furnished simultaneously, are:

First. Wisconsin and Minnesota.

Second. Washington territory and Oregon.

Third. Montana west of long. 110 degrees and Idaho, and lastly Dakota and the remainder of Montana. 458

Please give the information at the earliest day practicable, sending the same by mail to my address, Middletown, Connecticut.

Yours very respectfully,

EDWIN F. JOHNSON,

Eng. in Chf. N. P. R. R. Co."

"Middletown, Conn., May 24, '69.

HON. JOS. S. WILSON, Land Comm., etc.

Dear Sir: I wrote you some time since asking you to give me, at your earliest convenience, a statement of lands surveyed and disposed of by the government in the belt of country proposed to be traversed by the Northern Pacific Railroad Company to aid me in the location of the road. I can readily understand that considerable labor would be required to enable you to give the information asked for, and perhaps I asked for more than I could reasonably expect to labor would be required to enable you to give the information asked 459 receive. The information, if I could have it up to a given date, would nevertheless be of great service to me, especially in Minnesota. Farther west it would not be of so much consequence, though very desirable in Montana.

I would like also to receive from you the printed instructions of your department for the government of my assistants in making locations of the line for the withdrawal of the lands, etc. Copies

sufficient to supply say seven engineers of divisions. I have for my own use a copy which I suppose will answer unless there have been changes within the last 12 or 15 months.

Yours very respectfully,
EDWIN F. JOHNSON,
Eng. in Chf. N. Pacific R. R."

460

LIV.

That the defendant the Northern Pacific Railroad Company, a corporation, Edwin H. McHenry and Frank G. Bigelow, as receivers of the Northern Pacific Railroad Company, have each of them heretofore, and do each of them hereby expressly waive a demand for the re-conveyance of the land set out and described in the bill herein.

It is further stipulated by and between the parties hereto that the above and foregoing stipulation embraces all of the facts bearing upon the issues involved in this cause and that said facts or any of them are subject to the objection upon the part of either the complainant or the defendants herein that the same are incompetent, irrelevant and immaterial.

EUGENE G. HAY,
461 Solicitor for Complainant.
C. W. BUNN and JAMES B. KERR,
Solicitors for Defendants.

Dated October 28th, 1898.
(Endorsed) Stipulation of Facts.
Filed Nov. 1st, 1898.

HENRY D. LANG, Clerk.
By LOUISE B. TROTT, Deputy.

CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF MINNESOTA.

UNITED STATES OF AMERICA, - - - - Complainant.

vs.

NORTHERN PACIFIC RAILROAD COMPANY, a Corporation, EDWIN H. McHENRY and FRANK G. BIGELOW, as Receivers of the Northern Pacific
462 Railroad Company, and the Northern Pacific Railway Company, - - - - - - - - Defendants.

STIPULATION.

It is hereby stipulated and agreed by and between the complainant above named by Eugene G. Hay, its solicitor, and the Northern Pacific Railroad Company and Edwin H. McHenry and Frank G.

Bigelow, as receivers of the Northern Pacific Railroad Company, by C. W. Bunn and James B. Kerr, their solicitors, that those seven plats or maps, marked Exhibits 1 to 7 inclusive, on file herein and referred to in the agreed stipulation of facts on file herein, be omitted from the printed record in this cause: but it is further stipulated that the said seven plats or maps may be used upon the final hearing in the same manner as if the same were incorporated in said printed record.

463

EUGENE G. HAY,
Solicitor for Complainant.
C. W. BUNN and
JAMES B. KERR,
Solicitors for Defendants, Northern Pacific Railroad Company, and Edwin H. McHenry and Frank G. Bigelow, Receivers.

(Endorsed.) Stipulation relative to exhibits.
Filed December 16th, 1898.
HENRY D. LANG, Clerk.

United States of America,
District of Minnesota. } ss. 464
Third Division. }

I, Henry D. Lang, Clerk of the Circuit Court, of the United States, for the District of Minnesota, do hereby certify that I have carefully compared the foregoing paper writings, viz: Bill of Complaint, Chancery Subpoena, Appearance of J. B. Kerr, Disclaimer, Order of Court, Stipulation Regarding Replication, Replication, Stipulation Regarding Amended Answer, Stipulation to Amend Answer of Defendants, Order Amending Answer, Answer of Defendants Northern Pacific Railroad Company and Edwin H. McHenry, and Frank G. Bigelow, as Receivers of the Northern Pacific Railroad Company, except Exhibit A (a map), Stipulation of Facts, and Stipulation relative to Exhibits which are in my custody as such clerk, and that such copies are correct copies of such originals and of the whole thereof, in the cause therein named.

(Seal). Witness my hand as Clerk, and the seal of said Court. Done at my office, in Saint Paul, Minnesota, this 16th day of November, A. D. 1898. 465

HENRY D. LANG,
Clerk.

157 Circuit court of the United States for the district of Minnesota.

UNITED STATES OF AMERICA, COMPLAINANT,
vs.
NORTHERN PACIFIC RAILROAD COMPANY, A CORPORATION, Edwin H. McHenry, and Frank G. Bigelow, as receivers of the Northern Pacific Railway Company, defendants.

STIPULATION.

Whereas, through the inadvertance of the parties, there was omitted from the stipulation of facts heretofore filed two certain letters of transmittal which were filed with the said map marked "Exhibit 2," which was filed on or about Nov. 21, 1871, to which reference is made in paragraph 9 of the stipulation of facts now on file:

Therefore, it is stipulated and agreed by and between the parties, by their respective solicitors, that the following additional statement shall be taken to be true and may be used upon the final hearing in this cause.

That with the original of that certain map, of which Exhibit 2 on file herein is a copy, referred to in paragraph 9 of the stipulation of facts on file herein, there was transmitted to the Secretary of the Interior, on or about the twentieth day of November, 1871, a letter in the words and figures following, to wit:

WASHINGTON, D. C., *18 Nov., 1871.*

SIR: I have the honor to submit herewith a duly certified map of the completed portion of the Northern Pacific R. R. (Minnesota division, 228.2 miles) from junction with Lake Superior and Miss. road at junction in Minn., to the Red River of the North, and would respectfully request that the granted and indemnity lands be withdrawn in accordance with law.

Very respectfully, your ob't servant,

B. F. WADE,
Agent and Attorney for the Northern Pacific Co.

Hon. C. DELANO,
Sec'y of Interior.

That upon receipt of said letter set forth, the Secretary of the Interior duly transmitted the said map, together with the said letter of B. F. Wade, to the Commissioner of the General Land Office, together with a letter in the words and figures following, to wit:

"ZBS.

LD. GT. R. RDS.,
DEPARTMENT OF THE INTERIOR,
Washington, D. C., 20th November, 1871.

SIR: I transmit herewith, for appropriate action, a duly certi-
158 fied map (received on the 18th inst., for the Hon. Benj. F. Wade, ag't and att'y, with his letter of that date) of the completed portion of the Northern Pacific Railroad (Minn. division, 228.2 miles) from

junction with the Lake Superior & Miss. road, at junction, Minn., to the Red River of the North.

Very respectfully, your ob't servant,

C. DELANO,
Secretary.

Hon. WILLIS DRUMMOND,
Comm'r G. L. O."

EUGENE G. HAY,
Solicitor for Complainant.
C. W. BUNN and
JAMES B. KERR,
Solicitors for Defendants.

Circuit court of the United States for the district of Minnesota.

UNITED STATES OF AMERICA, COMPLAINANT,
vs.
NORTHERN PACIFIC RAILROAD COMPANY, A CORPORATION, Edwin H. McHenry, and Frank G. Bigelow, as receivers of the Northern Pacific Railway Company, defendants.

STIPULATION.

It is hereby stipulated and agreed by and between the parties hereto, by their respective solicitors, that the stipulation of facts hereto annexed may be referred to upon the hearing for the same purposes and with the same effect as if the same had been incorporated in the printed record.

EUGENE G. HAY,
Solicitor for Complainant.
C. W. BUNN and
JAMES B. KERR,
Solicitors for Defendants.

(Indorsed:) Stipulation as to two certain letters of transmittal which were filed with map marked Exhibit 2. Filed Jan'y 4, 1899. Henry D. Lang, clerk.

UNITED STATES OF AMERICA,
District of Minnesota, ss.

I, Henry D. Lang, clerk of the circuit court of the United States for the district of Minnesota, do hereby certify that I have carefully compared the foregoing paper writings, viz, stipulation as to two letters of transmittal which were filed with map, Exhibit 2, with the originals thereof, which are in my custody as such clerk, and that such copies are correct copies of such originals and of the whole thereof, in the cause therein named.

159 Witness my hand as clerk, and the seal of said court. Done at my office at St. Paul, Minnesota, this 4th day of January, A. D. 1899.

[SEAL.] HENRY D. LANG, *Clerk.*

(Indorsed:) Supplemental record: Filed January 6th, 1899. Henry D. Lang, clerk.

United States circuit court for the district of Minnesota.

Term minutes, June term, A. D. 1898.

JANUARY 6th, 1899.

Friday morning.

Court opened pursuant to adjournment.

Present: Hon. Wm. Lochren, judge; Hon. Robert G. Evans, U. S. district attorney; Hon. R. T. O'Connor, U. S. marshal; Henry D. Lang, clerk.

UNITED STATES OF AMERICA, *vs.* NORTHERN PACIFIC RAILROAD COMPANY, A CORPORATION, Edwin H. McHenry and Frank G. Bigelow, as receivers of the Northern Pacific Railroad Company.	C. Equity. No. 734.

This cause coming on to be heard upon the pleadings, final proofs, and arguments of counsel, the complainant appears by its solicitor, Eugene G. Hay, esq., and the defendants appeared by their solicitor, James B. Kerr, esq., thereupon said cause is argued on behalf of the complainant by Eugene G. Hay, and on behalf of the defendants by James B. Kerr, and the argument thereof not being concluded at the hour of adjournment, it is ordered that further proceedings herein be, and they hereby are, postponed until to-morrow morning at 9.30 o'clock.

Ordered that this court do now adjourn until to-morrow morning at 9.30 o'clock.

A true record.

Attest: HENRY D. LANG, *Clerk.*

(Term minutes, vol. 18, page 229.)

Term minutes, June term, A. D. 1898.

JANUARY 7th, 1899.

Saturday morning.

Court opened pursuant to adjournment.

Present: Hon. Wm. Lochren, judge; Hon. Robert G. Evans, U. S. district attorney; Hon. R. T. O'Connor, U. S. marshal; Henry D. Lang, clerk.

* * * * * * *

160 UNITED STATES OF AMERICA, *vs.* NORTHERN PACIFIC RAILROAD COMPANY ET AL. } C. Equity. No. 734.

This cause coming on to be further heard, the same is argued on behalf of the complainant by Eugene G. Hay, esq., and on behalf of the defendants by James B. Kerr, duly submitted, and by the court taken under advisement.

* * * * * * *

Ordered that this court do now adjourn until Monday morning next at 10 o'clock.

A true record.

Attest: HENRY D. LANG, *Clerk.*

(Term minutes, vol. 18, page 237.)

Term minutes, January term, A. D. 1899.

FEB'Y 20th, 1899.

Monday morning.

Court opened pursuant to adjournment.

Present: Hon. Wm. Lochren, judge; Hon. Robert G. Evans, U. S. district attorney, by Milton D. Purdy, assistant; Henry D. Lang, clerk.

* * * * * * *

Term minutes, January term, A. D. 1899.

FEB'Y 20th, 1899.

In the circuit court of the United States for the district of Minnesota.

At a stated term of said court, begun and held according to law, at the United States court room in the city of St. Paul in the said district, on the 11th day of January, 1899.

Present and presiding the Honorable William Lochren, judge, on the 20th day of February, 1899, the following proceedings were had, to wit:

UNITED STATES OF AMERICA, *vs.* NORTHERN PACIFIC RAILROAD COMPANY, A CORPORATION, Edwin H. McHenry and Frank G. Bigelow, as receivers of the Northern Pacific Railroad Company and the Northern Pacific Railway Company.	C. Equity. No. 734.

DECREE.

The above-entitled cause having come on to be heard, and having been submitted to the court upon the pleadings therein, and upon an
161 agreed statement of facts, signed by the solicitors of the respective parties and on file herein; and said cause having been argued by counsel, and the court being advised, it is, on motion of counsel for defendants,

Ordered, adjudged, and decreed that the bill of complaint of the complainant herein be, and it is hereby, dismissed for want of equity.

By the court, WM. LOCHREN, *Judge.*

* * * * * * *

Ordered that this court do now adjourn until the 27th day of February at 10 o'clock a. m.

A true record.

Attest: HENRY D. LANG, *Clerk.*

(Term minutes, vol. 19, page 54.)

United States circuit court, district of Minnesota, third division.

THE UNITED STATES OF AMERICA
vs.
THE NORTHERN PACIFC RAILROAD COMPANY AND Edwin H. McHenry and Frank G. Bigelow, as receivers of the Northern Pacific Railroad Company, impleaded with the Northern Pacific Railway Company.

DECISION.

The bill in this suit was filed by the Attorney-General, and prays for a decree canceling and annulling a patent issued by the United States on the 22nd day of April, 1895, conveying to the Northern Pacific Railroad Company lot five (5), in section twenty-nine (29), in township fifty-four (54) north, of range thirteen (13) west, in the county of St. Louis and State of Minnesota, upon the alleged ground that said patent was issued without authority of law, through mistake and inadvertence.

The Northern Pacific Railway Company answered, disclaiming any right, title, or interest in the land in question, and is therefore out of the case.

The facts are all admitted, either in the pleadings or in the stipulation of facts, in the record, so that it is needless to restate them. The act of Congress of July 2, 1864, creating the Northern Pacific Railroad Company, and granting lands to aid in the construction of its railroad and telegraph line, empowered that company to locate the eastern terminus of such railroad at any point on Lake Superior, in the State of Minnesota or State of Wisconsin; and the controversy in this case depends
162 entirely upon the ascertainment of what place on Lake Superior, within said States, became, through the selection or acts of that company, the eastern terminus of said railroad, as contemplated by that act of Congress. If, as is claimed on behalf of complainant, the eastern terminus of said railroad was established either at Duluth, in the State of Minnesota, or Superior, in the State of Wisconsin, it is admitted that the land in question was not within the land grant of the Northern Pacific Railroad Company, and that the patent therefor was issued without authority of law; but if, as is claimed on behalf of the defendants, the eastern terminus of said railroad was lawfully established at Ashland, in the State of Wisconsin, it is admitted that said land was within the said land grant, and was lawfully selected, and that said patent therefor was and is valid.

It seems to be conceded, and I think it is true, that whenever, under its power of selection given by said act, the said railroad company actually fixed and established the eastern terminus of said railroad at a place on Lake Superior within either of said States, such power of selection would thereby become fully executed; and the railroad company could not thereafter, under the provisions of that act alone, or as affecting its land grant, extend such railroad further to the east to a new eastern terminus. But it does not follow from this that the first place at which said railroad, in the course of its construction, touched the shore of Lake Superior in either of said States became thereby the eastern terminus of

said railroad. The right of the company to select such eastern terminus extended to any place the company might choose for that terminus, on the shore of said lake in either of said States. From that place the direction of the route of the railroad was to be westerly—tending to the west—"by the most eligible railroad route as shall be determined by said company;" the limit of its variation being that it keep within the territory of the United States and north of the forty-fifth parallel of latitude. The general trend of the shore of Lake Superior is in a southwest direction from the northern boundary of Minnesota to St. Louis Bay, so that had Grand Marais been selected as the eastern terminus of the railroad the company might have determined upon a route following the shore and touching the lake at Two Harbors, Duluth, and other points westerly of such eastern terminus as the most eligible route. And had the mouth of the Montreal River, or Ashland, in the State of Wisconsin, been fixed upon as such eastern terminus, the route therefrom westerly touching the lake at many places, including Superior, might properly have been determined by the company to be the most eligible. The word "eligible" in such case means preferential or desirable; and in determining the
163 eligibility of the route of a railroad, not only facilities for its construction, but all advantages for procuring business are properly considered; and what is advantageous to the railroad company in this regard is correspondingly advantageous to the public. The act did not require the eastern terminus to be fixed before the construction of the railroad was begun, nor prescribe at what place or places such construction should be commenced, or in what directions the work should be prosecuted; the railroad might therefore be constructed so as to reach and be operated from some intermediate place on Lake Superior before such construction had reached the eastern terminus, and indeed before the eastern terminus [were] definitely fixed and selected.

Said act allowed the Northern Pacific Railroad Company to consolidate or associate with any other land-grant railroad, having a road on any part of its route; it also provided that said Northern Pacific Railroad Company should obtain the consent of the legislature of any State through which any portion of its railroad line passed, previous to commencing the construction thereof. On March 2, 1865, the legislature of the State of Minnesota passed an act granting consent to said company to construct and maintain its line of railroad within the limits of that State, subject to the condition that should said company elect to place the eastern terminus of said railroad east of that State, it should, in that case, construct or cause to be constructed a line of railroad from its main line to the navigable waters of Lake Superior, within the State of Minnesota, of the same gauge as its main line, and for that purpose granted to said company the same powers, rights, and privileges which it had to construct its main line within said State of Minnesota.

The legislature of the State of Wisconsin, by act passed April 10, 1865, supplemented by another act passed March 25, 1872, granted consent to said company to construct and maintain its line of railroad within the limits of that State, subject to the condition that it should construct and forever maintain a line of railroad continuous to its main line by a route running south of the St. Louis River, from the junction of its railroad with the Lake Superior and Mississippi Railroad, intersecting the west-

ern boundary of Wisconsin between the St. Louis and Nemadji rivers and running thence, all the way in Wisconsin, between said rivers to the Bay of Superior, and construct there a depot, and docks and piers.

The railroad of the Lake Superior and Mississippi Railroad Company, the construction of which was aided by a land grant, was constructed between St. Paul and Duluth in the State of Minnesota, and on July 9, 1870, about the time when the Northern Pacific Railroad Company
164 began the construction of its railroad from a point of junction with said railroad of the Lake Superior and Mississippi Railroad Company at Thomson, near the Dalles of the St. Louis River in Minnesota, extending such construction westward therefrom, said Northern Pacific Railroad Company entered into a preliminary contract or agreement with said Lake Superior and Mississippi Railroad Company, in the considerations for which other companies or associations were interested, for the use by the said Northern Pacific Railroad Company, in common with said Lake Superior and Mississippi Railroad Company, of the railroad of said last-named company between said point of junction and Duluth, with concessions to said Northern Pacific Railroad Company of terminal facilities at Duluth. Thereafter, on the first day of January, 1872, the [the] Lake Superior and Mississippi Railroad Company by deed conveyed to the Northern Pacific Railroad Company an equal undivided one-half of that part of its railroad extending from its connection with the Northern Pacific Railroad near Thomson about 26 miles to a point named in the city of Duluth, with appurtenances and terminals described; and on the same day an agreement in writing was entered into between the same two companies relative to their joint management and control of the same section of railroad, and that thereafter, for about fourteen years, while said Northern Pacific Railroad Company was constructing its railroad westward towards and to Puget Sound, it ran its regular trains from Thomson Junction to Duluth over the same section of railroad, and during the same time expended large sums of money in the improvement of that section of railroad and in railroad buildings, wharves, and other structures at Duluth for the transaction of its railroad business; and had no other line of railroad to Lake Superior until the year 1881 or 1882, when it constructed its said railroad eastward from Superior City to Ashland, in the same State. On the 28th day of August, 1884, the board of directors of the Northern Pacific Railroad Company adopted a resolution fixing and establishing the eastern terminus of that railroad on Lake Superior at a point at the city of Ashland, in the State of Wisconsin, in section 27, township 48 north, range 4 west of the 4th principal meridian, and on the 3rd day of December, 1884, transmitted a duly certified copy of such resolution to the Commissioner of the General Land Office.

The power to select and locate the eastern terminus of its railroad at a point on Lake Superior within the limits of Minnesota or Wisconsin being vested in the Northern Pacific Railroad Company, any act of that company having the effect of once fixing such terminus would execute and exhaust the power. A resolution of the board of directors fixing
165 such terminus would be effectual; so would a map definitely locating such terminus, when filed in the General Land Office; so would the construction and operation of the railroad to or from a place on said lake, within either of said States, under circumstances showing a then present purpose of establishing such eastern terminus at that place.

In view of the power granted to the Northern Pacific Railroad Company by the act of July 2, 1864, to consolidate or associate with any other land grant railroad company, having a railroad on any part of its route, its association with the Lake Superior and Mississippi Company, in respect to the section of railroad from Thomson to Duluth and its establishment of terminal facilities there, and running its trains in connection with the lake navigation, for a considerable term of years, would, if there was no other satisfactory explanation for its acquiring such interest in that section of railroad, or evidence of the intention of the company to make its eastern terminus elsewhere, [offered] fair conclusive evidence of the adoption of Duluth as such eastern terminus. This would have been certain had the Northern Pacific Railroad Company claimed any land grant in respect to this section of railroad, as its land grant only applied to its main line. But it never claimed any land grant in respect to this section. Its charter required it to obtain the consent of the legislature of Minnesota before constructing its line across that State; and such consent was burthened with the condition that if it fixed its eastern terminus east of Minnesota it should construct or cause to be constructed a line of railroad of the same gauge from its main line to the navigable waters of Lake Superior within the State of Minnesota, granting it the powers necessary to enable it to construct such branch line. The State legislature could affix such condition and grant such powers, as the same in no way affected the powers granted by Congress in respect to the main line of the railroad. The defendants claim that such acquisition of rights by it in this section of railroad was to satisfy the said condition required by the legislature of the State of Minnesota, and that if the performance did not strictly follow the language of the condition, that State only can object to the variation.

The recital in the deed of January 1, 1872, from the Lake Superior and Mississippi Railroad Company to the Northern Pacific Railroad Company of the undivided one-half of said section of railroad, to the effect that the last-named company desires to secure such interest, to the end that the necessity for the construction of its railroad from the connection of the railroads to the city of Duluth may be obviated, as such recital may be attributed to said condition imposed by the act of the
166 Minnesota legislature, throws no light on the intention of the Northern Pacific Railroad Company at that time as to its eastern terminus, while the stipulation contained in the preliminary agreement of July 9, 1870, between the same companies and other companies, to the effect that the Northern Pacific Railroad Company would not build any other road, so as to form a connection running eastward of the Lake Superior and Mississippi Railroad north of Wyoming, previous to the completion of its road to the Missouri River, is at least consistent with a then present purpose on the part of the Northern Pacific Railroad Company to extend its railroad east of this line or branch to Duluth. On the whole, I do not think that any or all of these transactions establish the fact that the Northern Pacific Railroad Company fixed or located the eastern terminus of that railroad at Duluth. And the fact that it never claimed any lands in connection with or on account of that section of railroad is persuasive evidence that it did not regard it as any part of its main line.

In reaching this conclusion I attach no force to the fact that this half interest in that section of railroad between Thomson and Duluth was abandoned by the Northern Pacific Railroad Company in the year 1881.

The building of the railroad from Thomson to Superior City, and construction there of docks, depot, and warehouses, was in accordance with the condition imposed on the company by the Wisconsin legislature, and the construction of the railroad was continued thence to Ashland within a brief time. There is nothing in these acts of the company showing that it ever located the eastern terminus of its railroad at Superior.

None of the maps introduced in evidence has the effect of definitely locating the eastern terminus of this railroad. The Perham map (so called) was transmitted by Josiah Perham, president of the Northern Pacific Railroad Company, to the Secretary of the Interior, March 6, 1865, with a letter of transmittal stating that Perham had, by authority of the board of directors, designated upon it in red ink the general line of the railroad, from a point on Lake Superior, in the State of Wisconsin, to a point on Puget Sound, etc. On this map appear two red lines, from an interior point to Lake Superior, one ending at Duluth, Minnesota, and the other, obliterated through its length by a wavy red line, ends at the mouth of the Montreal River, in Wisconsin. It is claimed on the part of the complainant that the effect of this map was to fix the eastern terminus of the railroad at Duluth, the end at Lake Superior, of the line not obliterated. But the records of the meetings of the board of directors fail to disclose any authority to Perham to make or file any map or designate any
167 line. Again, Perham's letter of transmittal of the map states that the board of directors authorized him to designate in red ink on that map the general line of the railroad from a point on Lake Superior, in the State of Wisconsin.

This statement negatives any authority to him, then, to designate any line from Duluth, in the State of Minnesota. The apparent obliteration of one of the lines is unaccounted for; the map was rejected by the General Land Office, and the entire line traced upon it is plainly at random and conjectural. The map is worthless for any purpose. And the other maps produced have no value as evidence of the actual location by the Northern Pacific Railroad Company of the eastern terminus of its railroad.

The position that the company could not lawfully extend the construction of its railroad, so as to entitle itself to lands under its land grant, after the time limited by acts of Congress for the completion of the railroad had fully expired, is untenable. The construction could continue and entitle the company to lands under the grant until a forfeiture of the grant was declared, either by Congress or by a competent court in a proceeding for that purpose. And the fact that such belated construction was toward and to a tardily designated terminus of the railroad could make no difference; nor would the fact that such terminus was the first point referred to in the general description of the route in the act of Congress. Such description merely designated the location and limits of the route in a general way, but did not direct where the construction of the railroad should be begun or where it should end.

The construction of this railroad from Thomson to Ashland between the years 1881 and 1884 was examined in sections as completed by commissioners appointed by the President, pursuant to the act of Congress. The commissioners reported favorably in each case, and their reports were approved by the President and acted upon by the General Land

Office. These acts of the executive department concurrent with the construction of the railroad between Superior and Ashland, and the very serious consequences to railroad company if it were now held that such action of the executive department was unauthorized, and that the railroad company had no right to construct and has now no power or authority to own or use that portion of its railroad, should have weight if the question of the right of the company to build its railroad to Ashland were doubtful, as it is not, in my judgment.

The rule that grants by the sovereign, including, of course, all grants by the Government, of franchises or of aid to a corporation, shall
168 be strictly construed applies with full force to any case where the right to exercise the franchise to the extent attempted, or the right to aid has not been conceded, but has been continually denied on the part of the Government. But such rule of strict construction is not fairly applicable to a case where the corporation has done acts and made large expenditures under the assumption that such acts necessitating such expenditures were within the scope of its franchises, being encouraged thereto by affirmative acts by the proper department of the Government confirmative of the same construction of the franchise. In such a case, in the absence of fraud, and after the lapse of years, the question of the correctness of such construction can scarcely be considered an open question.

My conclusion is that the eastern terminus of the Northern Pacific Railroad was established at Ashland, in the State of Wisconsin, by the resolution of the board of directors of the Northern Pacific Railroad Company of August 28, 1884, above referred to, and by the construction of the railroad to that place. It follows that the complainant is not entitled to the relief prayed, and judgment is directed dismissing the bill of complaint on the merits.

WM. LOCHREN, *Judge*.

(Indorsed:) Decision ordering decree dismissing bill of complaint. Filed January 28th, 1899. Henry D. Lang, clerk.

Circuit court of the United States in and for the district of Minnesota, third division.

THE UNITED STATES OF AMERICA, COMPLAINANT, *vs.* THE NORTHERN PACIFIC RAILROAD COMPANY, a corporation, the Northern Pacific Railway Company, a corporation, and Edwin H. McHenry and Frank G. Bigelow, as receivers of the Northern Pacific Railroad Company, defendants.	Petition for appeal.

Now comes the United States of America, complainant in the above-entitled action, by Eugene G. Hay, esq., special assistant United States [—], herein lawfully authorized and directed by the honorable Attorney-General of the United States so to do, and conceiving itself aggrieved by the decree entered in the above-entitled cause on the 20th day of

February, 1899, doth hereby appeal from said decree to the United States circuit court of appeals for the eighth circuit, and said complainant prays that its said appeal may be allowed and that a transcript of the
169 record, proceedings and papers upon which said decree was made, duly authenticated, may be sent to the United States circuit court of appeals for the eighth circuit.

EUGENE G. HAY,
Special Assistant United States Attorney for the District of Minn., Solicitor for Complainant.

Dated April 22nd, 1899.

And now to wit, on the 22nd day of April, 1899, it is ordered that the above appeal in the above-entitled cause be allowed as prayed for.

WALTER H. SANBORN,
Circuit Judge.

(Indorsed.) Petition for appeal, and order allowing same. Filed April 22nd, 1899. Henry D. Lang, clerk.

Circuit court of the United States in and for the district of Minnesota, third division.

UNITED STATES OF AMERICA, COMPLAINANT,
vs.
NORTHERN PACIFIC RAILROAD COMPANY, A corporation, the Northern Pacific Railway Company, a corporation, Edwin H. McHenry and Frank G. Biglow, as receivers of the Northern Pacific Railroad Company, defendants.
} Assignment of errors.

And now in the foregoing-entitled cause and at the time of filing therein its petition for appeal, comes the said appellant, the United States of America, by Eugene G. Hay, special assistant United States attorney, hereunto lawfully authorized and directed by the honorable Attorney-General of the United States, and says that in the records and proceedings in the above-entitled cause, there is manifest error in this, to wit, that the court erred:

First. In not holding that the land grant of the Northern Pacific Railroad Company had lapsed before the road of the said company was built to Ashland, Wisconsin, and before said road had been connected with Lake Superior except at Duluth, Minnesota, by the purchase of a half interest in the Lake Superior & Mississippi Railroad.

Second. In not holding that the land grant of the Northern Pacific Railroad Company had lapsed before any map of definite location of said railroad east of Duluth, Minn., had been filed by the said company in the office of the Secretary of the Interior or the Commissioner of the General Land Office.

Third. In holding that the Northern Pacific Railroad Company could lawfully extend the construction of its railroad so as to [entitle] it to lands under its land grant after the time limited by act of Congress for the completion of the railroad had fully expired.

170 Fourth. In not holding that the Northern Pacific Railroad Company had by its various acts selected Duluth, Minn., as the

eastern terminus of its road, and thereby satisfied its land grant and exhausted its charter powers in that respect.

Fifth. In holding the purchase by the Northern Pacific Railroad Company of a one-half interest in the railroad of the Lake Superior and Mississippi Railroad [—] from Thomson Junction to Duluth, Minn., and operating its trains by said Northern Pacific Railroad to and from Duluth, Minn., to its western terminus, over the road so purchased for more than twelve years before its road was built to Ashland, and more than ten years before its map of definite location of a road east of Duluth, Minn., was filed, did not, under the facts in the case, constitute a selection by said Northern Pacific Railroad Company of Duluth as its initial point or eastern terminus.

Sixth. In not holding that the Northern Pacific Railroad Company by the contracts, agreements, deed, and lease set out as Exhibits "A," "A1," "B," "B1," and "C" of the bill, and carrying out and performing all of the conditions thereof, and for a period of fourteen years operating its trains from Duluth to Thomson Junction over the road of which said company acquired an interest by said contracts, agreements, deed, and lease; did consolidate, confederate, and associate with a land-grant railroad as provided for in section three of the act of Congress of July 2nd, 1864, entitled "An act granting land to aid in the construction of a railroad and telegraph line from Lake Superior to Puget Sound on the Pacific coast by the northern route," and thereby selected Duluth as the initial point or eastern terminus of said road.

Seventh. In holding that the building of a railroad by the Northern Pacific Railroad Company from its main line at Thomson Junction [at] Superior, Wisconsin, on Lake Superior, did not, under the facts in this case, constitute the selection of Superior as the eastern terminus of said road and exhaust the charter powers of said company in that respect.

Eighth. In not holding that the Northern Pacific Railroad Company had prior to the passage on August 28th, 1884, of the resolution of i's board of direction fixing Ashland as its eastern terminus, by its acts selected Duluth as its eastern terminus and exhausted its charter powers in that respect.

Ninth. In holding that the eastern terminus of the Northern Pacific Railroad was established at Ashland, in the State of Wisconsin, by
171 the resolution of the board of the Northern Pacific Railroad Company of August 28th, 1884, and by the construction of the railroad to that place.

Tenth. In holding that the rule that grants by the sovereign should be strictly construed is not fairly applicable to this case.

Eleventh. In not granting the complainant the relief prayed for in the bill.

Twelfth. In dismissing the complainant's bill of complaint.

Wherefore the said appellant prays that the decree of the said circuit court of the United States for the district of Minnesota in the above-entitled cause be reversed.

EUGENE [—],
Assistant United States Attorney for the District of Minnesota,
Solicitor for Complainant.

(Indorsed:) Assignment of errors and prayer for reversal. Filed April 22nd, 1899. Henry D. Lang, clerk.

Circuit court of the United States in and for the district of Minnesota, third division.

THE UNITED STATES OF AMERICA, COMPLAINANT,
vs.
THE NORTHERN PACIFIC RAILROAD COMPANY, A CORPORATION, the Northern Pacific Railway Company, a corporation, and Edwin H. McHenry and Frank G. Biglow, as receivers of the Northern Pacific Railroad Company, defendants. } Citation.

THE UNITED STATES OF AMERICA, *ss.*

To the Northern Pacific Railroad Company, the Northern Pacific Railway Company, and Edwin H. McHenry and Frank G. Bigelow, as receivers of the Northern Pacific Railroad Company, greeting:

You and each of you are hereby cited and admonished to be and appear at the United States circuit court of appeals for the eighth circuit, to be holden at the city of St. Louis, sixty (60) days from and after the date hereof, pursuant to an appeal taken out of and allowed by the circuit court of the United States for the district of Minnesota, third division, wherein the United States of America is appellant and the Northern Pacific Railroad Company, a corporation, the Northern Pacific Railway Company, a corporation, and Edwin H. McHenry and Frank G. Bigelow as receivers of the Northern Pacific Railroad Company, are respondents, to show cause, if any there be, why the decree in the said appeal
172 mentioned should not be set aside and corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the honorable Walter H. Sanborn, judge of the United States circuit court for the district of Minnesota, this 22nd day of April, in the year of our Lord one thousand eight hundred and ninety-nine.

WALTER H. SANBORN,
Circuit Judge.

Original. Entered 734 C. E. Circuit court of United States, district of Minnesota, third division. The United States of America, complainant, vs. The Northern Pacific Railroad Company, a corporation, the Northern Pacific Railway Company, a corporation, and Edwin H. McHenry and Frank G. Bigelow, as receivers of the Northern Pacific Railroad Company, defendants. Filed April 22nd, 1899. Henry D. Lang, clerk. Citation. Due service of the within citation is hereby admitted at St. Paul, Minnesota, this 22nd day of April, 1899. C. W. Bunn and James B. Kerr, solicitors for defendants.

Circuit court of the United States in and for the district of Minnesota, third division.

THE UNITED STATES OF AMERICA, COMPLAINANT,
vs.
THE NORTHERN PACIFIC RAILROAD COMPANY, A CORPORATION, the Northern Pacific Railway Company, a corporation, and Edwin H. McHenry and Frank G. Bigelow, as receivers of the Northern Pacific Railroad Company, defendants.
} Stipulation.

The complainant in the above-entitled action having appealed from the decree rendered therein dismissing its bill of complaint to the circuit court of appeals of the eighth circuit, and said appeal having been allowed, it is hereby stipulated and agreed by and between the parties to the above-entitled action by the respective solicitors that in order to save the expense of reprinting the record in said action on appeal, and to expedite the hearing of said appeal, the record as printed for the hearing in the circuit court shall be used in the circuit court of appeals, after adding thereto the decree, petition for and order allowing appeal, complainant's assignments of error, and citation, all of which has been duly served; and the opinion of the court below upon dismissing said bill; and that said record so made up may be considered and taken by said circuit
173 court of appeals as [in] full, true, and complete record of all proceedings in said cause in the circuit court [—] may be used without printing the same in the record of said circuit court of appeals.

EUGENE G. HAY,
Solicitor for Complainant.
C. W. BUNN and
JAMES B. KERR,
Solicitors for Defendants.

(Indorsed:) Stipulation. Filed April 22nd, 1899. Henry D. Lang, clerk.

UNITED STATES OF AMERICA.

Circuit court of the United States, district of Minnesota, third division.

I, Henry D. Lang, clerk of said circuit court, do hereby certify and return to the honorable the United States circuit court of appeals for eighth circuit, that the foregoing, consisting of 183 pages, numbered consecutively from 1 to 183, inclusive, is a true and complete transcript of the records, process, pleadings, orders, final decree, and all other proceedings in said cause, and of the whole thereof, as appears from the original records and files of said court; and I do further certify and return, that I have annexed to said transcript, and included within said paging, the original citation, together with the proof of service thereof.

In witness whereof, I have hereunto set my hand and affixed the seal of said court, at Saint Paul, in the district of Minnesota, this 27th day of April, A. D. 1899.

HENRY D. LANG, *Clerk.*

[Seal U. S. circuit court, dist. of Minnesota, third division.]

Filed Apr. 27, 1899. John D. Jordan, *Clerk.*

174 And on the fifth day of May, A. D. 1899, an appearnce of Mr. Eugene B. Hay, as counsel for the appellant, was filed in the clerk's office of said circuit court of appeals in said cause in the words and figures following:

United States circuit court of appeals, eighth circuit.

UNITED STATES OF AMERICA, APPELLANT, *vs.* THE NORTHERN PACIFIC RAILROAD COMPANY et al.	No. 1259, May term, 1899.

The clerk will enter my appearance as counsel for the appellant.

EUGENE G. HAY.

(Endorsed:) U. S. circuit court of appeals, eighth circuit. May term, 1899. No. 1259. The United States of America, appellant, *vs.* Northern Pacific Railroad Co. et al. Appearance. Filed May 5, 1899. John D. Jordan, clerk. Eugene G. Hay, counsel for appellant.

And on the fourth day of May, A. D. 1899, an appearance of Mr. C. W. Bunn and James B. Kerr, as counsel for the appellees, was filed in the clerk's office of said circuit court of appeals in said cause in the words and figures following:

United States circuit court of appeals, for the eighth circuit.

UNITED STATES OF AMERICA, APPELLANT, *vs.* NORTHERN PACIFIC RAILROAD COMPANY, AND Edwin H. McHenry and Frank G. Bigelow, as receivers of the Northern Pacific Railroad Company, appellees.	

To JOHN D. JORDAN, *Clerk:*

175 Please enter our appearances on behalf of the appellees above named.

Yours,

C. W. BUNN &
JAMES B. KERR.

(Endorsed:) No. 1259. United States of America, appellant, *vs.* Northern Pacific R. R. Co. et al. Appearance. Filed May 4, 1899. John D. Jordan, clerk. C. W. Bunn, James B. Kerr, counsel for appellees.

And on the fifth day of June, A. D. 1899, in the record of the proceedings of said circuit court of appeals is an order of submission in said cause in the words and figures following:

United States circuit court of appeals, eighth circuit. May term, 1899.

MONDAY, *June 5, 1899.*

THE UNITED STATES OF AMERICA, APPELLANT,
vs.
THE NORTHERN PACIFIC RAILROAD COMPANY et al. } No. 1259.

Appeal from the circuit court of the United States for the district of Minnesota.

This cause, having been advanced and assigned for hearing this day, came on to be heard, and upon the application of counsel for the parties the time for argument was extended one-half hour to each party, and argument was commenced by Mr. Eugene G. Hay for appellant, continued by Mr. James B. Kerr for appellees, and concluded by Mr. Eugene G. Hay for appellant.

Thereupon this cause was submitted to the court on the transcript of record from said circuit court and the briefs of counsel filed herein.

And on the tenth day of July, A. D. 1899, an opinion of said circuit court of appeals was filed in said cause in the following words, to wit:

176 United States circuit court of appeals, eighth circuit.

No. 1259.—May term, A. D. 1899.

THE UNITED STATES OF AMERICA, APPELLANT,
vs.
THE NORTHERN PACIFIC RAILROAD COMPANY, The Northern Pacific Railway Company, and Edwin H. McHenry and Frank G. Bigelow, as receivers of the Northern Pacific Railroad Company, appellees. } Appeal from the circuit court of the United States for the district of Minnesota.

Mr. Eugene G. Hay, for appellant.

Mr. James B. Kerr (Mr. C. W. Bunn was with him on the brief), for appellees.

Before Caldwell, Sanborn, and Thayer, circuit judges.

This is an appeal from a decree which dismissed a bill brought by the United States to avoid a patent to a tract of land which was issued to the Northern Pacific Railroad Company by the Land Department of the Government "under the erroneous impression and mistaken belief," as the appellant averred, that it was within the limits of the Congressional grant to that company. This land was selected by the appellee and patented to it by the Government in lieu of a lost tract of land which was within the place limits of its grant if that grant extended to Ashland, in

the State of Wisconsin, and which was not within its grant unless that grant extended east of Duluth, in the State of Minnesota, and the Government claims that the mistake of the Land Department was that it found that the eastern terminus of the Northern Pacific Railroad was at Ashland, when it should have held that it was at Duluth, and it is conceded on all hands that the patent was properly issued if the finding of the Department on this question was right. The following facts relative to this issue are established: On July 2, 1864, Congress passed "An act granting lands to aid in the construction of a railroad and telegraph line from Lake Superior to Puget's Sound, on the Pacific coast, by the northern route." (13 Stat., 365.) By the first section of that act certain persons therein named and their associates were created a corporation by the name Northern Pacific Railroad Company. One portion of the section read: "And said corporation is hereby authorized and
177 empowered to lay out, locate, construct, furnish, maintain, and enjoy a continuous railroad and telegraph line, with the appurtenances, namely, beginning at a point on Lake Superior, in the State of Minnesota or Wisconsin; thence westerly by the most eligible railroad route as shall be determined by said company within the territory of the United States on a line north of the forty-fifth degree of latitude to some point on Puget's Sound, with a branch via the valley of the Columbia River," etc., and it provided that the capital stock of the corporation should consist of one million shares, of one hundred dollars each. By section three of the act there was granted to the corporation every alternate section of public land, not mineral, to the amount of ten alternate sections per mile, on each side of the railroad line it should adopt through any State, with indemnity lands not more than 10 miles beyond the limits of the alternate sections, and this section contained these provisos: "Provided, That if said route shall be found upon the line of any other railroad route to aid in the construction of which lands have been heretofore granted by the United States, as far as the routes are upon the same general line, the amount of land heretofore granted shall be deducted from the amount granted by this act: Provided further, That the railroad company receiving the previous grant of land may assign their interest to said Northern Pacific Railroad Company or may consolidate, confederate, and associate with said company upon the terms named in the first section of this act." Section four of the act provided that whenever a section of twenty-five miles of the railroad was completed commissioners appointed by the President should examine it and if it appeared to have been built as required by the act they should so report, and thereupon patents to lands appertaining to such section should be issued.

Section five required the railroad to be constructed and equipped as a first-class railroad and contained this sentence: "And it shall be the duty of the Northern Pacific Railroad Company to permit any other railroad which shall be authorized to be built in the United States, or by the legislature of any Territory or State in which the same may be situated, to form running connections with it, on fair and equitable terms."

Section eight provided "that each and every grant and privilege herein are so made and given to, and accepted by, said Northern Pacific Rail-

road Company upon and subject to" the condition that it should complete and equip the railroad by the fourth day of July, A. D. 1876. The time for its completion was, however, subsequently extended to July 4, 1880. (14 Stat., 355; 16 Stat., 255.)

Section 18 provided that the company should obtain the consent of the legislature of any State through which any portion of its railroad should pass previous to commencing the construction thereof.

By the act of May 5, 1864 (13 Stat., 64), Congress had granted to the State of Minnesota for the purpose of aiding in the construction of a railroad from St. Paul to the head of Lake Superior five alternate sections of land per mile on each side of that railroad. The State of Minnesota transferred this grant to the Lake Superior & Mississippi Railroad Company, and that company constructed the railroad from St. Paul to Duluth by way of Thomson, where the Northern Pacific Railroad subsequently crossed it.

178 On May 5, 1864, Congress granted to the State of Wisconsin to aid in the construction of a railroad from Portage City, Berlin, Doty's Island or Fond du Lac, to Bayfield, and thence to Superior, every alternate section of land for ten sections in width on each side of the railroad. (13 Stat., 67.) This grant was transferred by the State of Wisconsin to the Portage, Winnebago and Superior Railroad Company, which filed its map of definite location on November 10, 1869, and thereupon the lands within the limits of the grant were withdrawn from settlement and entry and so remained until after the Northern Pacific Railroad Company filed its map of definite location of July 6, 1882. That portion of this railroad from Bayfield to Superior never was built, but it was on the same general route as a portion of the road of the Northern Pacific Railroad Company from Thomson to Ashland. On March 2, 1865, the legislature of the State of Minnesota passed an act which gave to the Northern Pacific Railroad Company all the powers, rights, and privileges in the State of Minnesota which had been conferred upon it in the Territories of the United States by the act of Congress subject to a proviso that if it elected to make the eastern terminus of its road east of the State of Minnesota, it should construct or cause to be constructed a line of railroad from its main line to the navigable waters of Lake Superior in the State of Minnesota. Special Laws of Minnesota, 1865, p. 228.

On April 10, 1865, the legislature of the State of Wisconsin passed an act which vested this corporation with the same powers and privileges in the State of Wisconsin which it had under the act of Congress in the Territories. Private Laws of Wisconsin, 1865, chap. 385. On March 25, 1872, that legislature passed an act amendatory of chapter 385 of the laws of 1865 which provided that the Northern Pacific Railroad Company should not be permitted to construct, maintain, or operate any railroad in any part of the State of Wisconsin except in Pierce and St. Croix counties unless it constructed and maintained a line of railroad connecting with and continuous to its main line by a route running south of the St. Louis River from the junction of its railroad with the Lake Superior and Mississippi Railroad, intersecting the western boundary of Wisconsin at some point between the St. Louis and Nemadji rivers, and running thence all the way in Wisconsin to some point on the southwesterly

shore of the Bay of Superior between Nemadji River and Connor's Point. Private Laws of Wisconsin, 1872, ch. 139.

On March 6, 1865, Josiah Perham, the president of the Northern Pacific Railroad Company, filed with the Secretary of the Interior a letter and a map. In the letter he wrote to the Secretary that by authority of the board of directors he had designated on the accompanying map, in red ink, the general line of the railroad from a point on Lake Superior, in the State of Wisconsin, to a point on Puget Sound, in Washington Territory. The point on Lake Superior in the State of Wisconsin from which the red line on this map extended was at the mouth of the Montreal River on the eastern boundary of that State, but this line from that point to a point in North Dakota is covered by a wavy red line and another and heavier red line extends from that point in North Dakota to a point on the north shore of Lake Superior in Minnesota. The Secretary of the Interior sent this map the Commissioner of the General Land Office with a statement that he thought that the odd-numbered
179 sections for ten miles in width on each side of the line in Minnesota and Wisconsin should be withdrawn from entry and settlement. In June, 1865, the Commissioner declined, in a letter to the Secretary, to make the withdrawal and no further action was ever taken upon this map. Perham does not appear to have had any authority from the board of directors to designate the line of the railroad or to file the map.

Prior to August 13, 1870, the board of directors of the Northern Pacific Railroad Company adopted the general route of its railroad through Wisconsin and Minnesota, and on that day filed a map thereof in the office of the Commissioner of the General Land Office. Upon that map the line of the railroad extends from a point on Lake Superior at the mouth of the Montreal River on the eastern boundary of the State of Wisconsin upon a direct line a little south of west to a point about six miles distant from the south end of Chequemagon Bay; thence a little north of west upon a line which passes about eight miles south of Superior, crosses the west line of the State of Wisconsin a few miles south of the point where the St. Louis River meets that line, crosses the Lake Superior and Mississippi Railroad at or near Thomson, and continues thence westerly to Wallula, in the State of Washington. This map was accepted by the Secretary of the Interior and the Commissioner of the General Land Office, and the odd-numbered sections within the limits of the land grant on each side of the line on this map in the States of Wisconsin and Minnesota were withdrawn from entry and sale and the even-numbered sections were raised in price to $2.50 per acre, and large quantities thereof have been sold at that price. On November 21, 1871, the railroad company filed with the Commissioner of the General Land Office a map of the definite location of its railroad from Thomson, on the Lake Superior and Mississippi Railroad, westerly to the Red River of the North on the same general route indicated on the map of August 13, 1870.

In the summer of 1870 the Lake Superior and Mississippi Railroad from St. Paul to Duluth had been built. The general direction of this road is north and south, but from Thomson to Duluth, a distance of twenty-six miles, it runs more to the east than to the north. The

construction of a railroad from Thomson to Lake Superior was expensive and difficult. Thomson was many hundred feet above the lake on a plateau whose eastern slope was rocky, uneven, and full of ravines.

The general route of the Northern Pacific road, as shown on the maps of 1870 and 1871, and as it has since been constructed, is east and west, and it crosses the Lake Superior and Mississippi road at Thomson. The Northern Pacific Company did not commence at Lake Superior and build the portion of its line east of Thomson first, but it began the construction of its railroad at Thomson in 1870, and built westerly to a point fifty-five miles west of Helena, in the State of Montana, where, in 1883, this portion of the road was joined with a portion which had been constructed from Wallula in the State of Washington east to that point. In 1881 and 1882 it built its railroad from Thomson eastward to Bluff Creek in the city of Superior on Lake Superior, and prior to 1885 it completed it from Thomson to a point in the city of Ashland on Lake Superior, which its board of directors resolved was its eastern terminus. In 1885, 1886, and 1887 it constructed its line from near Wallula across the Cascade
180 Mountains to the city of Tacoma, and the entire road was completed in August, 1887, and was accepted by the President. During the construction of its railroad the Northern Pacific Company formed and maintained running connections with the Lake Superior and Mississippi Railroad Company over the twenty-six miles of the latter's road from Thomson to Duluth, in this way: On July 9, 1870, it agreed with the Lake Superior and Mississippi Company and two land companies that it would connect its railroad with that of the latter company at Thomson so as to open and maintain direct connection by rail with Duluth and so as to enable that city to be one of its principal points of trade and transshipment on Lake Superior; that it would enter into equitable and just running arrangements with the latter company to accomplish this object; that it would make its first connection east from the point of intersection of the two roads by way of the line of the Lake Superior and Mississippi Company over Rice's or Minnesota Point, and that it would not build any other road so as to form a connection running eastward of the road of the latter company north of Wyoming (a town on that road) previous to the completion of its road to the Missouri River. The other parties to this contract agreed to furnish the Northern Pacific Company certain land in and about Duluth and Thomson for shops, depots, stations, and other railroad purposes. This agreement was performed. On January 1, 1872, the Lake Superior and Mississippi Railroad Company conveyed an undivided half of its road from Thomson to Duluth, and of its appurtenances, to the Northern Pacific Company by a deed which recited that the latter company was authorized to construct and operate an independent line which would run into and through Duluth and terminate at a point adjoining the terminus of the Lake Superior and Mississippi Railroad, and that the Northern Pacific Company agreed to purchase the half of the twenty-six miles of railroad to obviate the necessity for its construction of a railroad from Thomson to Duluth. At the time this deed was made the two companies entered into an agreement for the joint operation of this railroad from Thomson to Duluth. On May 1, 1872, the Lake Superior and Mississippi Company leased its entire road to the Northern Pacific

Company for 999 years, and on April 21, 1874, that lease was surrendered and renounced by mutual agreement. It was suggested in 1873 that the effect of the deed and agreement of January 1, 1872, was to fix the eastern terminus of the Northern Pacific Railroad at Duluth, and thereupon, at the request of the Northern Pacific Company, the board of directors of the Lake Superior and Mississippi Company by resolution agreed with the Northern Pacific Company that this was not the effect of their agreement or the intention of the parties to it. From the first day of January, 1872, to the first day of January, 1886, the Northern Pacific Company sent its engines and trains over, and operated the twenty-six miles of railroad from Thomson to Duluth under the agreements we have recited, but it then abandoned and has not since used that road and it never asked or received any lands under its grant on account of it.

The railroad from Thomson to Ashland, which was constructed in 1881, 1882, 1883, and 1884, was duly examined and approved as a part of the railroad of the Northern Pacific Company by commissioners appointed by the President under the act of July 2, 1864, and the land grant was adjusted and the lands within the limits of the grant
181 along that line east of Thomson, including the tract here in controversy, were patented to the Northern Pacific Company accordingly. On July 3, 1882, the Northern Pacific Company transmitted to the Secretary of the Interior the map of the definite location of its railroad from Thomson to a point in section 15, township 47 north of range 2 west, in the State of Wisconsin, about ten miles west of the mouth of the Montreal River. The line of definite location shown on this map followed the general route marked out on the map of August 13, 1870, but it turned to the north at Superior and at Ashland so as to reach Lake Superior at those cities. This map of definite location was accepted, the land grant was adjusted to the line there shown, and the lands appertaining to this portion of the road were withdrawn from sale and entry in 1883 by direction of the Secretary of the Interior. The railroad was constructed from Thomson to Ashland on this line with slight and permissible variations. On August 28, 1884, the board of directors of the Northern Pacific Company passed, and, on December 3, 1884, transmitted a copy of this resolution to the Commissioner of the General Land Office:

"Resolved, That the eastern terminus or the point of beginning of the Northern Pacific Railroad on Lake Superior be, and the same is hereby fixed, determined and established at a point at the city of Ashland, on Lake Superior, in the county of Ashland, in the State of Wisconsin, in section 27, township 48 north, range 4 west of the fourth principal meridian."

The point named in this resolution is about 1 mile north of the line of definite location shown on the map of July 6, 1882, and about 12 miles west of the most easterly point shown on that line. The officers of the Land Department accepted this resolution as a selection by the company of the eastern terminus of the railroad, the road was constructed, the land grant was adjusted, and the lands within it were patented accordingly. From 1884 until 1895 the railroad company, the United States, and their respective officers held that Ashland was the eastern terminus

of the Northern Pacific Railroad and that the railroad from Thomson to Ashland was a part of the line constructed under and entitled to the benefit of the act of July 2, 1864. On August 27, 1896, the Secretary of the Interior discovered that the eastern terminus of this railroad was at Duluth, that the road from Thomson to Ashland was not a part of the railroad constructed under the act of Congress, and that none of the lands on either side of it were within the grant made by that act. (23 L. D., 204; 21 L. D., 412.)

Sanborn, circuit judge, after stating the case as above, delivered the opinion of the court.

This is a suit to avoid a patent issued to the Northern Pacific Railroad Company, the appellee, by the Land Department of the United States. The Land Department is a quasi-judicial tribunal, and a patent is the judgment of that tribunal upon the questions presented and a conveyance in execution of the judgment. When it is attacked, two questions are presented. They are: Did the Department have jurisdiction to issue the patent and to determine the questions which conditioned its issue? and, Was its judgment induced by fraud, mistake of fact, or error in
182 law? The limits of the jurisdiction of this department and the classes of cases which fall within that jurisdiction have been considered and stated by this court with some care in United States v. Winona & St. Peter Railroad Co., 32 U. S. App., 272, 282–286, 15 C. C. A., 96, 103–107, 67 Fed. Rep., 948, 955–959, to which reference is made for a more extended discussion of this subject. The rule, broadly stated, is that the Land Department has jurisdiction over every case in which the control and disposition of the land is intrusted to its care, and that its judgment in such a case, whether right or wrong, conveys the legal title to the patentee and is valid, unless avoided for error, mistake, or fraud. The land in dispute in this case and the tract of land in the place limits of the grant to this company in lieu of which the patent to this land was issued, were intrusted to this Department for disposition, and the power was granted to it and the duty imposed upon it to hear and determine the question who was entitled to the conveyance of this land from the Government. Its judgment was therefore not without jurisdiction and its patent conveyed the legal title.

The second question is: Was this patent void because the decision upon which it was based was induced by error, fraud, or mistake of fact? A court of equity has the power to set aside such a patent in a case in which the action of the Department has resulted from a clear error of law. Bogan v. Edinburgh American Land Mortgage Co., 27 U. S. App., 346, 350, 11 C. C. A., 128, 130, 63 Fed. Rep., 192, 195, and cases there cited. Its decision of a question of fact, however, is conclusive even in a direct proceeding to set aside the patent unless it is first made to appear clearly that its adjudication was caused by a plain mistake or was induced by fraud or perjury. There is no general appeal from the officers of the Land Department to the courts, and the latter can not review the decisions of questions of fact rendered by those officers in the absence of convincing proof that they were induced by fraud or mistake. (United States v. Mackintosh, 56 U. S. App., 483, 490, 29 C. C. A., 176, 179, 85 Fed. Rep., 333, 336; United States v. Budd, 144 U. S., 154, 168; Diller

v. Hawley, 48 U. S. App., 462, 472, 26 C. C. A., 514, 518, 81 Fed. Rep., 651, 655.)

The averment of the bill in this case is that the officers of the Land Department by mistake conveyed the land here in question to the Northern Pacific Railroad Company, under the erroneous belief that it was within the grant made to that company by its charter, the act of July 2, 1864. (13 Stat., 365.) It is, however, conceded that if the eastern terminus of the railroad is in the city of Ashland, in the State of Wisconsin, this land was properly patented, and the real claim of the Government is that Land Department was mistaken in holding that Ashland was its eastern terminus when it should have held that this terminus was at Duluth, or at Thomson, in the State of Minnesota, or at Superior in the State of Wisconsin. In reaching the decision which resulted in the issue of this patent the Land Department must have decided two questions—one a question of law, whether or not the railroad company had the right under its charter to select Ashland as its eastern terminus, and the other a question of fact, whether or not it did so select it. We will first consider the question of law.

When Congress made the offer to Richard D. Rice and his associates of the grant of lands contained in the act of July 2, 1864, its primary purpose was to get the greatest amount of railroad and not
183 to save the largest amount of land. The region north of the 45th degree of latitude, through which the road was to run, was practically unknown and uninhabited and was popularly believed to be covered with ice and snow for more than half the year. The lands of the Government along this line were unoccupied and unsalable, and without a railroad they would have been the abode of Indians and wild animals to this day. Congress recognized the fact that the wealth of a nation is not its trackless forests or barren prairies, but its industrious and prosperous citizens. The United States offered this grant of land for the construction of a railroad to the end that some of its useless lands might be sold and that the region through which the railroad was to pass might be what it has since become, the home of intelligent, loyal, and contented subjects. But it took good care by doubling the price of the even-numbered sections which it retained within the limits of the grant that, while it secured to itself these inestimable advantages, it should incur no possible loss. The task was so gigantic and its accomplishment so doubtful that the offer contained in the act of 1864 failed to induce its performance and Congress was so anxious that the road should be built that in 1870 it extended the indemnity limits of the grant ten miles on each side of the line. (16 Stat., 865.) It is well to call these facts to mind when the object of the Government has been attained, when the road has been constructed, and when, many years after the contract between the Government and the company has been executed, its terms are to be construed. The intention of the parties in the making of this contract must be interpreted in the light of these facts and conditions which surrounded them when the agreement was made. (Accumulator Co. v. Dubuque St. Ry. Co., 27 U. S. App., 364, 372, 12 C. C. A., 37, 42, 64 Fed. Rep., 70, 74.) Let us now return to the question.

Did the act of 1864 authorize the railroad company to select Ashland as its eastern terminus? Section 1 of that act empowered the corpora-

tion "to lay out, locate, construct, furnish, maintain, and enjoy a continuous railroad and telegraph line, with the appurtenances, namely, beginning at a point on Lake Superior, in the State of Minnesota or Wisconsin; thence westerly by the most eligible railroad route * * * to some point on Puget's Sound." The city of Ashland is in the State of Wisconsin. It is on Lake Superior. It has a harbor fit for the terminus of a great railroad. The terms of the act are plain and argument and exposition can add nothing to this statement. Since the eastern terminus of the road was not fixed by the act and the charter gave the railroad company the unlimited power to locate it at any point on Lake Superior in Minnesota or Wisconsin, the conclusion is irresistible that the power to locate it in either State and at any suitable city on the lake in either of these States, and hence to locate it at the city of Ashland, which has a safe and capacious harbor and is an eligible point, was conferred upon the company by this charter.

It is doubtful whether this power would ever have been questioned if the decision of Secretary Lamar (4 L. D., 458), subsequently approved in United States v. Southern Pacific Railroad, 146 U. S., 570, 596, had not been erroneously supposed to furnish some authority for the position that the Northern Pacific Company was limited in its selection of its eastern terminus either to the most westerly point, or to the first point on
184 Lake Superior which its railroad reached. This was that case:

On July 27, 1866, Congress passed an act which created the Atlantic and Pacific Railroad Company, authorized it to construct and operate a railroad from a point near the town of Springfield, in the State of Missouri, westward through Albuquerque "and thence along the thirty-fifth parallel of latitude, as near as may be found most suitable for a railway route, to the Colorado River, at such point as may be selected by said company for crossing; thence by the most practicable and eligible route to the Pacific," and granted lands on each side of the line of the railroad to aid in its construction. (14 Stat., 292, c. 278.) The railroad company constructed its road to the Pacific Ocean at San Buena Ventura under this act, and filed maps of definite location of its line of railroad for a distance of 380 miles northward from this point along the Pacific coast to San Francisco, but it never constructed its railroad beyond San Buena Ventura. Upon this state of facts Secretary Lamar held that the company had constructed its railroad "by the most practicable and eligible route to the Pacific" when it had built it to the Pacific Ocean at San Buena Ventura, and that it took no lands under its grant to aid in the construction of a railroad along the coast to other points. If, however, that act had empowered the company to build a railroad from Springfield, in the State of Missouri, to a point on the Pacific Ocean in the State of California or in the State of Oregon by the most eligible route, to be selected by the company, and if that company had constructed its railroad to a capacious harbor in the State of Oregon, we apprehend that Secretary Lamar would not have hesitated to hold that the construction of such a railroad was authorized by the act, and that the land grant followed the road even if it skirted the Pacific almost at right angles to the general route from San Buena Ventura to Oregon. The Northern Pacific Company did not turn from the direction of its general route to reach the city of Ashland. The general direction of the route of its railroad

is east and west. The south shore of Lake Superior from Duluth and Superior to Ashland extends in an easterly direction. Ashland is about sixty miles east and only about twelve miles south of Superior. The primary purpose of the grant was to get the largest amount of railroad possible constructed, to open to settlement as much unoccupied territory as possible, not to save to the Government the largest quantity of vacant land. Witness the additional grant of 1870. The people of Minnesota and Wisconsin were anxiously endeavoring to compel the company to build as much railroad as possible in their respective States. Witness the power to fix the initial point in either State inserted in the act of Congress and the acts of the legislatures of those States which required the company to connect the main line of its railroad with the cities of Duluth and Superior. (Special Laws of Minnesota, 1865, p. 228; Private Laws of Wisconsin, 1872, chap. 139.) Every mile of railroad constructed opened to settlement and occupation lands that were uninhabited and practically useless to the Government. Turn this case as you will, look at the literal terms of the charter which themselves settle it, at the considerations which induced its enactment, or at the facts and conditions surrounding the parties when it was passed, or at all of them together, and the result is the same. The charter empowered the company to fix the eastern terminus of its railroad at Ashland, in the State of Wisconsin,
and it constituted no objection to that power, or to its exercise,
185 that the road was first built to or connected with Lake Superior
at the city of Superior, at the city of Duluth, or at any other point before it reached the terminus chosen by the corporation. (Boston & Providence Railroad Corporation v. Midland Railroad Co., 1 Gray, 340, 367; Fall River Iron Works Co. v. Old Colony and Fall River Railroad Co., 5 Allen, 221, 227; United States v. Northern Pacific Railroad Co., 41 Fed. Rep., 842, 845; Kansas City, &c., Railroad Co. v. Attorney-General, 118 U. S., 682; Parke's Appeal, 64 Pa. St., 137.) The Land Department committed no error of law when it held that this company had authority under its charter to locate its eastern terminus at Ashland.

The second question is: Did the Land Department make a mistake of fact when it found that the Northern Pacific Company actually selected Ashland as its eastern terminus? It will be conceded in the discussion of this question that the corporation could make but one selection, and that when it once made its choice its power in that regard was exhausted. But there were three essentials to a valid selection. There were a deliberate intention on the part of the company to make the choice, the clear expression of that intention to the Land Department of the United States, and the acceptance and approval of that selection by that department. There was no time fixed by the charter for the making of this choice short of that named for the completion of the road, and until the selection was made and accepted by the Government the company undoubtedly had the same right to form and change its intention in this respect that it had relative to the definite location of the line of its railroad. In Sioux City, &c., Land Co. v. Griffey, 143 U. S., 32, 39, Mr. Justice Brewer, in delivering the opinion of the Supreme Court relative to the right of a company under a similar grant to change its intention as to the line of its railroad, said: "The fact that the company has surveyed and

staked a line on the ground does not conclude it. It may survey and stake many and finally determine the line upon which it will build by a comparison of the cost and advantages of each; and only when by filing its map it has communicated to the Government the knowledge of its selected line is it concluded by its action," and in the later case of Northern Pacific Railroad Company v. Smith, 171 U. S., 260, 264, 267, that court held that this company had the right to change the location of its right of way and the line of its railroad from that marked on its map of definite location at any time before the commissioners examined and approved the constructed railroad. No reason occurs to us why the company had not a similar right in the matter of the selection of its eastern terminus. It is not perceived why this company had not the right to survey and stake lines, and under the additional powers granted and, in the performance of the additional tasks imposed by the legislatures of Minnesota and Wisconsin, to build and operate railroads to various points on Lake Superior in those States, and finally to determine at which point it would fix its eastern terminus "by a comparison of the cost and advantagesof each." It undoubtedly had this right, and only when it communicated to the Land Department its deliberate selection of that terminus and only when that choice was accepted and approved by that department was it finally concluded by its action. We say advisedly that only when the selection was accepted by the Land Department was it conclusive, because it was the undoubted duty of that department to consider
186 this selection when it was communicated to it, to accept it if the point chosen was eligible, and to reject it if the place selected was on some bold, storm-swept promontory, or the marshy shore of a shallow bay, or in any, other place where the transfer of passengers and freight from the railroad to vessels on the lake would have been either impossible or inconvenient.

It was the province and duty of that Department to hear and determine this question just as it was its province and duty to determine whether or not the line which the company selected for its railroad was a reasonably direct and eligible railroad route, and whether or not it was north of the 45th parallel of latitude, and its decision and judgment upon these questions was final and conclusive unless revised on appeal or avoided for fraud or mistake in a direct proceeding for that purpose. Buttz v. Northern Pacific Railroad, 119 U. S., 55, 72; St. Paul, M. & M. Ry. Co. v. Sage, 36 U. S. App., 340, 355, 17 C. C. A., 558, 567, 71 Fed. Rep., 40, 49; Hartman v. Warren, 76 Fed. Rep., 157, 159, 160, 22 C. C. A., 30, 33, 40 U. S. App., 245, 250.

It is contended by the counsel for the Government that by the acts and contracts recited in the statement which precedes this opinion the Northern Pacific Company exercised its power of selection and thereby (1) fixed the eastern terminus of its railroad at Duluth in the State of Minnesota, (2) fixed that terminus at Superior City in the State of Wisconsin, and (3) that by its delay until 1884 it forfeited its right to locate that terminus at Ashland. The fact remains, however, that the company never expressed to the Land Department any intention to select either Duluth or Superior as its eastern terminus, and that every map, plat, and communication which it sent to the Government indicated its purpose to fix that terminus at least as far east as the city of Ashland. The letter

and map of Perham, the president of the company, in 1865, with the letter of the secretary which transmitted the map to the commissioner, notwithstanding the wavy mark over the original line of the route, constitute convincing evidence that the line on that map which Perham marked terminated at the mouth of the Montreal River, on the eastern boundary of the State of Wisconsin, 20 miles east of Ashland, and at least 80 miles east of Superior and Duluth. We say these letters constitute convincing evidence of this fact because the letter of Perham declares that the line extends from a point in Wisconsin and the letter of the secretary recommends the withdrawal of the lands in that State. The map, however, does not seem to have been authorized by the board of directors of the company, and it was rejected by the commissioner. Still it shows the intention of the president of the company. The accepted map of the general route of August 13, 1870, upon which the lands were withdrawn, shows the route extending easterly to the mouth of the Montreal River. The map of definite location of that part of the line east of Thomson, in the State of Minnesota, shows the line of the railroad extending to a point about 14 miles east of Ashland. The resolution of the board of directors of August 20, 1884, "fixed and determined and established" the eastern terminus at a point on Lake Superior, in the city of Ashland, which is specifically named in the resolution. These maps and this resolution of selection were communicated to and approved by the Land Department. The lands were patented in pursuance of that approval, the railroad was constructed to Ashland, was examined
187 and approved by the commissioners appointed by the President, and has been in operation to that city for more than a decade. Here is indubitable proof of the purpose of this company to select the city of Ashland as the eastern terminus of its railroad, of the communication of that selection to the Land Department, and of the acceptance and approval of that choice by the Government. There is no evidence in the case that the company ever selected or intended to select, or that the Land Department ever approved the selection of any other place. In view of these facts, what avenue of escape can there be from the conclusion which the Land Department reached when it issued this patent that the company had selected the city of Ashland for the eastern terminus of its road?

It is earnestly contended by the counsel for the Government that by the agreements and deed recited in the statement preceding this opinion the Lake Superior & Mississippi Railroad Company "consolidated, confederated, and associated" in 1870 and 1872, with the Northern Pacific Railroad Company, under the second proviso of section 3 of the latter's charter, and that by this act and by operating its trains over the 26 miles of railroad of the Lake Superior & Mississippi Company from Thomson to Duluth, during its construction period from 1872 to 1886, the Northern Pacific Company selected Duluth as its terminus and thereby exhausted its power to choose. The 26 miles of railroad which extended from Thomson to Duluth was less than one-fifth of the railroad of the Lake Superior & Mississippi Company and it extended from Thomson, whence the Northern Pacific Company was constructing and operating its railroad westerly, in a northeasterly direction to Lake Superior at Duluth. The Northern Pacific Company had no railroad to the lake; it had undertaken

a difficult, burdensome, and gigantic task, and a railroad down the broken and rocky hill from Thomson to Lake Superior was exceedingly difficult to construct and expensive to maintain.

It is said that the agreements and deed between the two companies must have been a consolidation, confederation, and association, because the Northern Pacific Company had no power to make those agreements or to accept that deed except under the consolidation proviso of section 3 of its charter. It is true that the powers of corporations are limited to those expressly granted and to those fairly incidental thereto, but it is also true that the incidental powers of a great railroad corporation like the Northern Pacific Company are ample without the proviso in section 3 to authorize it to make all the contracts, with reference to this 26 miles of railroad, which are found in the record, for the purpose of enabling it to operate its trains to the head of Lake Saperior while it was constructing its railroad from Thomson to the Pacific Ocean. See Union Pacific Ry. Co. v. Chicago, R. I. & P. Ry. Co., 10 U. S. App., 98, 107, 196; 2 C. C. A., 174, 178, 234, 245; 51 Fed. Rep., 313, 321, 331, where this court held that the incidental powers of such a corporation were sufficient to empower it to make a lease of the joint use of 36 miles of railroad from Lincoln to Beatrice, Nebraska, of several miles of railroad in the city of Omaha and of terminal facilities in that city, for 999 years. Moreover, if there were any doubt about this proposition, it would be put at rest by the last clause of section 5 of the charter of this company, which reads: "And
it shall be the duty of the Northern Pacific Railroad Company to
188 permit any other railroad which shall be authorized to be built
by the United States, or by the legislature of any Territory or State in which the same may be situated, to form running connections with it on fair and equitable terms." Under this section of the charter it was the duty of this company to make equitable agreements for running connections with the Lake Superior & Mississippi Company, and the duty implied the power. Ample authority to make the trackage contracts and running arrangements in question may also be found in the act of the legislature of the State of Minnesota of March 5, 1865. Special Laws of 1865, p. 229. It is not necessary, therefore, to appeal to the proviso for consolidation, confederation, and association in section 3 to find authority for the acts and contracts of these two companies relative to the road from Thomson to Duluth.

Nor do these contracts, this deed of the undivided half of that railroad and the operation of the railroad under them, constitute an exercise of the power conferred by that proviso. It was only "on the terms named in the first section of the act" that this consolidation, confederation, and association could be made, and it could only be made by a consolidation of the Lake Superior & Mississippi Railroad Company into the Northern Pacific Railroad Company, not by a consolidation of the Northern Pacific Company into the Lake Superior & Mississippi Company. These restrictions upon this consolidation, confederation, and association mark one of the primary objects and insure the accomplishment of one of the great purposes of the charter, namely, that a single corporation, the corporation created by that charter, should in the end own and operate a continuous railroad from Lake Superior to Puget Sound and be subject to the call of the Government to transport its mails, its troops and its muni-

tions of war, and to discharge the other duties imposed by the act. The Government did not make this land grant or propose to confirm or convey it to the lessee or part owner of the disjointed fragments of other railroads, but to the owner of an entire continuous railroad. It was to this end that Congress studiously inserted in this proviso, not that the railroad having the previous grant might lease its railroad to the Northern Pacific Company or rent or buy a portion of that of the Northern Pacific Company, but that it might assign its interest to that company, or might consolidate, confederate, and associate with it on the terms mentioned in the first section of the act. It might assign its railroad to the Northern Pacific Company and thereby that company would become the absolute owner of it, or it might unite with the Northern Pacific Company on the terms mentioned in the first section of the latter's charter, and if it did unite with it on those terms the same result would follow. In either event the Northern Pacific Company would become the absolute owner of the road of the company having the previous grant. What were the terms mentioned in the first section of the act? They were, when read in connection with the proviso in the third section, that the company having the previous grant might become consolidated, associated, and confederated in some lawful way with Richard D. Rice and the other parties there named, or with their successors, "in a body corporate and politic under the name, title, and style of the Northern Pacific Railroad Company," and that its interest should be represented by a proper proportion of the $100,000,000 of capital stock authorized by that section. It was an inexorable condition of the exercise of the
189 power of assignment or of union conferred by the second proviso in section 3 of this charter that the ownership of the railroad having the previous grant should be vested in the Northern Pacific Railroad Company. Nothing of this character was ever done with the railroad of the Lake Superior & Mississippi Company or with any part of it; the power conferred upon that company to consolidate, confederate, and associate with the Northern Pacific Company never was exercised, and the railroad of that company from Thomson to Duluth never became a part of the railroad constructed by the Northern Pacific Company under its charter.

In this connection the attention of the court has been challenged to the fact that by the agreement of July 9, 1870, the Northern Pacific Company contracted to make its first connection east from Thomson by way of the road of the Lake Superior & Mississippi Company and agreed not to build any other road east of that railroad north of Wyoming before it completed its road to the Missouri River, to the fact that in the deed of January 1, 1872, there is a recital that the Northern Pacific Company is authorized to construct and operate a railroad which would run to Duluth and terminate at a point adjoining the terminus of the Lake Shore & Mississippi Railroad, and that it had agreed to purchase an undivided half of the railroad of that company from Thomson to Duluth "to the end that the necessity for the construction of the said Northern Pacific Railroad from the said point of connection to the city of Duluth may be obviated," to the fact that the Northern Pacific Company operated its trains over this railroad for 14 years, and it is urged that these facts proved the intention of the company to make Duluth the eastern terminus of its railroad. It is at least doubtful whether or not these facts

fairly indicate such an intention, for it will be noticed that the agreement not to construct a railroad east of the Lake Superior & Mississippi Railroad until the Northern Pacific Company had constructed its line to the Missouri River strongly implied the purpose to construct one east of that road as soon as the construction to the Missouri River had been completed. But let it be conceded that in 1870 and in 1872 the Northern Pacific Company did have the intention to make the eastern terminus of its railroad at Duluth. Its purpose at that time is not now material. It had the right to form and to change its intention until it exercised its power and made its selection. It never selected Duluth; never communicated to the Government the fact that it had made that selection; the Land Department never considered or approved the choice of that city as the terminus of this railroad, and the company never claimed and never received any lands on account of the railroad from Thomson to Duluth. The result is that this 26 miles of railroad never was a part of the railroad constructed under the charter of the Northern Pacific Company, and Duluth never was selected as and never became the eastern terminus of that railroad.

The next proposition of the United States is that the construction of the railroad from Thomson to the city of Superior in 1881 and 1882 fixed the eastern terminus of the road of the Northern Pacific Company at the latter city and limited the land grant to that portion which pertains to the road west of that city. This position rests upon the theory, which in an earlier part of this opinion has been shown to be unsound, that the corporation was limited in its selection to the most westerly eligible point on Lake Superior or to the point on that lake to which its railroad was first constructed. The charter contained no such limitation. It gave the company the unlimited right to choose any eligible point on the lake in the State of Minnesota or in the State of Wisconsin.

It is contended by counsel for the appellant that the Northern Pacific Company forfeited all its land grant pertaining to that portion of its railroad east of Thomson because it did not build this portion of its road or file any map of definite location of that part of its line or select Ashland as its eastern terminus until after July 4, 1880. The argument here is based on section 8 of the charter, which provides that "each and every grant, right, and privilege herein are so made and given to and accepted by said Northern Pacific Railroad Company upon and subject to the following conditions," one of which, as amended by the subsequent joint resolutions, is that the company shall construct, equip, furnish, and complete its entire road by the 4th day of July, A. D. 1880. 14 Stat., 355; 15 Stat., 255. On July 4, 1880, that part of the railroad east of Thomson and that part of it west of Wallula, in the State of Washington, were not constructed. They have since been built, examined, and accepted. It is too well settled, however, to admit of discussion, that the fact that these portions of the railroad were not completed on July 4, 1880, did not ipso facto forfeit or impair any of the rights or privileges granted by this charter. The grant was in presenti and the condition was a condition subsequent, which was ineffective until by act of Congress or by the decree of a court of competent jurisdiction in a direct proceeding for that purpose a forfeiture was declared. St. Paul & Pacific Railroad Co. v.

Northern Pacific Railroad Co., 139 U. S., 1; Schulenberg v. Harriman, 21 Wall., 44, 62; United States v. Southern Pacific Railroad, 146 U. S., 570, 606; Farnsworth v. Minnesota & Pacific R. R. Co., 92 U. S., 49, 67.

Moreover, it is extremely doubtful in view of the provisions of section 9 of the charter whether or not any court would have jurisdiction to hear an application for or to declare a forfeiture in the absence of an act of Congress directing such an application. That section provides that if the company makes any breach of the conditions of the act and allows the same to continue for upwards of one year "then in such case at any time hereafter the United States, by its Congress, may do any and all acts and things which may be needful and necessary to insure a speedy completion of the said road." Courts will hesitate long, we apprehend, to declare a forfeiture of the rights under this charter in the absence of any action by Congress. However this may be, no act of forfeiture has ever been passed, no decree of forfeiture has ever been rendered. This is not a suit for that purpose. It is nothing but a suit to avoid a patent to a single tract of land on the sole ground that the Land Department erroneously found the eastern terminus of the road to be at Ashland when it was at Duluth. No forfeiture of any of the rights and privileges of the company on account of the delay in the construction of its railroad has been prayed, no issue of forfeiture has been tendered or made by the pleadings, and that question is not here for consideration. It is a general rule that questions that are not within the issues presented by the pleadings may not be determined by the courts, much less may so
191 important a question as the forfeiture of the rights of a corporation to thousands of miles of railroad and thousands of acres of land under a Congressional grant. Courts have no jurisdiction to consider or determine the question of the forfeiture of a railroad land grant until it is raised by direct allegations in a suit instituted by lawful authority for the express purpose of preventing it.

It is said, however, that if this condition was subsequent, still it was not complied with, and that this fact furnished good ground for the avoidance of this patent. Attention is called to the fact that the time for the completion of the road had expired long before the map of definite location of the line east of Thomson was filed on July 3, 1882, long before the eastern terminus of the road was located at Ashland by the resolution of December 3, 1884, and long before a mile of the railroad east of Thomson was constructed, and it is insisted that by the expiration of the time fixed for the construction the company lost its right to locate or construct that portion of the railroad east of Thomson and its right to select its eastern terminus. There are two answers to this proposition which seem to us conclusive. In the first place, this is not a suit by the railroad company for the specific performance of the contract evidenced by its charter and for a conveyance of this land. The United States is not defending such a suit on the ground that the railroad company has not performed its part of the agreement in time. The railroad company is asking no relief. This is a suit in equity brought by the Government itself to set aside the solemn judgment and conveyance of the quasi-judicial tribunal to which it entrusted the power and on which it imposed the duty to hear and determine the very questions whether or not the corporation was entitled to do these acts and thereby to earn these lands,

notwithstanding the fact that the time fixed for their performance had passed. That tribunal determined all these questions from time to time, as they were presented, in favor of the railroad company. When the map of definite location of this part of the line was filed in 1882, the Land Department accepted and approved it and adjusted the land grant to the line there shown. When the resolution fixing the terminus at Ashland was filed, it accepted and approved that selection and adjusted the land grant accordingly. As the railroad was constructed from Thomson to Ashland, commissioners, appointed by the President under the charter, examined it and reported that it was completed in accordance with the requirements of the act, and the Land Department thereupon issued patents to the lands appertaining to this portion of the railroad. The company constructed its road from Thomson to Ashland over hill and dale, through forest, swamp, and morass in reliance upon these decisions and in the belief which they induced that it would thereby earn these lands, and it has been operating this railroad for more than a decade. While this construction was proceeding, Congress took no action under section 9 of the charter on account of any breach of the conditions thereof by the company; the Government brought no suit to avoid the decisions of these tribunals to which it had entrusted the power to hear and determine these questions, and gave no warning that it would ever question them, but now—more than ten years after the road was built; after the Government has secured the railroad, the advanced price of the even-numbered sections which it retained within the limits of the grant,
192 and the settlement, occupation, and sale of its otherwise worthless lands which the railroad has induced—it asks this court of equity to strip this company of the lands which it promised to convey and did convey, in consideration of the construction of the railroad, because that railroad was not built within the time fixed in the act. In other words, it asks this court to relieve it of the burdens while it retains the benefits of a contract which it not only permitted but actively induced the corporation to perform out of time and which it has itself executed. There is no equity in this prayer. The same fundamental rules of right and justice govern nations, municipalities, corporations, and individuals. The equities of the United States appeal to the conscience of the chancellor with no greater or less force than do those of a private individual under like circumstances. "A court of equity can act only on the conscience of a party; if he has done nothing that taints it, no demand can attach upon it so as to give any jurisdiction." Boone v. Childs, 10 Pet., 177, 210; Illinois Trust & Savings Bank v. City of Arkansas City, 40 U. S. App., 257, 294; 22 C. C. A., 171, 193; 76 Fed. Rep., 271, 293; United States v. Winona & St. Peter R. R. Co., 32 U. S. App., 272, 291; 15 C. C. A., 96, 108; 67 Fed. Rep., 948, 960. The act of the railroad company in building its road and receiving the land pertaining thereto was commendable. If one is unable to perform his promise at the time agreed upon, it is not wrong either in morals or in law, but eminently just and right, that he should perform it thereafter, especially when the promisee accepts and requests it. Courts of equity sometimes enforce the specific performance of a contract, but they never undo its execution when it has been performed on the one hand and its performance has been accepted on the other with a full knowledge on the part of both parties of the facts which condition its completion.

In the second place, when the corporation presented its map of definite location to the Land Department in 1882 and its selection of its eastern terminus in 1884, the only objection to their acceptance was that they were out of time. But the United States had the right to waive this objection and to approve the location and selection notwithstanding this fact, and when it did so and the road was constructed in reliance upon it, that waiver was irrevocable. The Government entrusted the power and imposed the duty to consider and determine whether or not this waiver should be made to the officers of the Land Department, and they waived the delay and approved the location and selection. These adjudications of this department stand unchallenged. No appeal was taken from them. They have not been set aside for fraud, error, or mistake. They therefore have all the force of judicial decisions and conclude the question. Hartman v. Warren, 40 U. S. App., 245, 250; 22 C. C. A., 30, 33; 76 Fed. Rep., 157, 159, 160; Bogan v. Edinburgh American Land Mortgage Co., 27 U. S. App., 346, 350; 11 C. C. A., 128, 130; 63 Fed Rep., 192, 195; St. Paul, M. & M. Ry. Co. v. Sage, 32 U. S. App., 340, 355; 17 C. C. A., 558, 567; 71 Fed. Rep., 40, 49.

Finally the counsel for the Government calls attention to the facts that the line of the railroad of the Portage, Winnebago & Superior Railroad from Bayfield to Superior was on the same general route as that of the Northern Pacific Company; that the grant to the former company antedated the grant to the appellee (13 Stat., 67); that the Portage
193 Company filed the map of definite location of its line from Bayfield to Superior on November 10, 1869; that the grant to the appellee overlaps this earlier grant to some extent, and that the lands covered by the earlier grant were withdrawn from entry and remained so withdrawn until after the appellee filed its map of definite location of this part of its line on July 6, 1882, and he suggests that the legal effect of these facts is, first, that under section 3 of the charter of the Northern Pacific Company its grant was diminished by the amount of lands within the limits of the grant to the Portage Company, and second, that all the lands within the limits of the grant to the Portage Company were excepted from the grant to the appellee. Upon examination of the record, however, we find that it is impossible to determine from the facts before us what the effect of these contentions, if sustained, would be, or whether or not they would have any effect upon the right of the appellee to the particular tract of land here in question. The case has evidently not been tried with any reference to their consideration. We therefore dismiss them with the remark that our silence does not indicate in any way the inclination of our minds concerning their soundness.

Our conclusion upon the facts of this record is that the Northern Pacific Railroad Company never selected any other place than Ashland as the eastern terminus of its railroad; that it selected a point on Lake Superior in the city of Ashland as its eastern terminus in 1884; that this selection was accepted and approved by the Land Department; that it had not forfeited or lost the power of selection when this choice was made, and that this point in the city of Ashland is the eastern terminus of the Northern Pacific Railroad. Northern Pacific Ry. Co. v. Doherty, 100 Wis., 39; United States of America v. Northern Pacific R. R. Co. et al., Fed. Rep., .

The questions presented in this case are of considerable moment although the quantity of land involved in this particular suit is small. It is important to settlers and occupants of the lands within the limits of the grant to the Northern Pacific Company between Thomson and Ashland, to the United States and to the railroad company that the title to these lands should be quieted and that doubts and fears concerning it should be dispelled. For this reason we have been constrained to examine and consider all the facts in the record before us, to decide the question of fact whether or not the company selected Ashland as its eastern terminus, on its merits, regardless of previous adjudications, and to briefly state the reasons which have led us to the conclusion we have announced. We are all of the opinion that the company duly selected Ashland. If, however, we had been led to give a different answer to this question of fact the decree below could not have been reversed or the patent in question set aside in this case. The question what place the company actually selected as the eastern terminus of its railroad was a question of fact which was necessarily decided by the Land Department when it issued the patent, and while the question of law whether or not the company had the right to select that point under its charter may be reviewed by the courts, this question of fact is not open to their consideration until it is first made to appear that the decision of this question by the Land Department was induced by fraud or mistake. There is no claim that it was caused by fraud. One who would attack a patent for a mistake
194 of fact in the decision of the questions which condition its issue must distinctly plead and clearly prove the evidence before the Land Department from which the mistake resulted, the particular mistake that was made, the way in which it occurred, and the fact that if it had not been made the decision would have been otherwise and the patent would not have issued before any court can enter upon the consideration of any issue of fact determined by the department. United States v. Atherton, 102 U. S., 372, 374; United States v. Budd, 144 U. S., 154, 167, 168; United States v. Mackintosh, 56 U. S. App., 483, 490; 29 C. C. A., 176, 179; 85 Fed. Rep., 333, 336; United States v. Throckmorton, 98 U. S., 61, 66, 68; Marquez v. Frisbie, 101 U. S., 473, 476. There was no plea or proof of this character in this case. The only averment of mistake in the bill is that the ministerial officers of the United States "through inadvertence and mistake conveyed by patent the above described land to the Northern Pacific Railroad Company under the erroneous impression and mistaken belief that the said tract was lying and being within the limits of the aforesaid grant to said Northern Pacific Railroad Company," and there is no evidence whatever upon this subject. It does not appear in the bill or in the proof in any way what evidence was before the Land Department upon the question of the selection of Ashland as the eastern terminus of its railroad by this company when that department decided that it had made this selection. It does not appear whether all or any of the evidence presented to the court below was before that department when it made its finding upon this question of fact, or whether its mistake was in overlooking some fact agreed upon, misreading some documentary evidence or in what it consisted. The extraordinary powers of a court of equity can not be invoked to set aside a solemn judgment of the Land Department upon a question of fact on a

mere general averment that it was rendered by mistake or procured by fraud. The nature of the mistake and the manner of its occurrence or the particulars of the fraud must be shown before such a judgment can be successfully assailed. The decree below is

Affirmed.

Filed July 10, 1899.

195 And on the tenth day of July, A. D. 1899, in the record of the proceedings of said circuit court of appeals is a decree in said cause, in the words and figures following:

United States circuit court of appeals, eighth circuit. May term, 1899

MONDAY, *July 10, 1899.*

THE UNITED STATES OF AMERICA, APPELLANT,
vs.
THE NORTHERN PACIFIC RAILROAD COMPANY, The Northern Pacific Railway Company, and Edwin H. McHenry and Frank G. Bigelow, as receivers of the Northern Pacific Railroad Company. } No. 1259.

Appeal from the circuit court of the United States for the district of Minnesota.

This cause came on to be heard on the transcript of the record from the circuit court of the United States for the district of Minnesota, and was argued by counsel.

On consideration whereof, it is now here ordered, adjudged, and decreed by this court that the decree of the said circuit court in this cause be, and the same is hereby, affirmed without costs to either party in this court.

July 10, 1899.

And on the fifteenth day of September, A. D. 1899, a petition for appeal to the Supreme Court of the United States was filed in the clerk's office of said circuit court of appeals, in said cause, in the words and figures following:

United States circuit court of appeals, eighth circuit.

196 THE UNITED STATES OF AMERICA, APPELLANT,
vs.
THE NORTHERN PACIFIC RAILROAD COMPANY, A CORPORATION, The Northern Pacific Railway Company, a corporation, and Edwin H. McHenry and Frank G. Bigelow, as receivers of the Northern Pacific Railroad Company, appellees. } Case No. 1259.

Petition for appeal.

Now comes the United States of America, appellant in the above entitled cause, by Eugene G. Hay, special assistant United States attorney

herein, lawfully authorized and directed by the honorable Attorney-General of the United States, and conceiving itself aggrieved by the order and decree affirming the decree of the circuit court made and entered in the above-entitled cause on the 10th day of July, 1899, by the United States circuit court of appeals for the eighth circuit, doth hereby appeal from said order and decree to the Supreme Court of the United States, and said appellant prays that its said appeal may be allowed, and that a transcript of the record, proceedings, papers, and maps upon which said order and decree was made, duly authenticated, may be sent to the United States Supreme Court.

EUGENE G. HAY,
Special Assistant U. S. Attorney for the District of Minnesota,
Solicitor for Complainant.

Dated September 15th, A. D. 1899.

And now, to-wit, on the 15' day of September, A. D. 1899, it is ordered that the above appeal in the above-entitled cause be allowed as prayed for.

WALTER H. SANBORN,
Circuit Judge.

(Endorsed:) Original. United States circuit court of appeals, eighth circuit. The United States of America, appellant, vs. The Northern Pacific Railroad Company et al., appellees. Petition for appeal filed Sept. 15, 1899. John D. Jordan, clerk.

197 And on the fifteenth day of September, A. D. 1899, an assignment of errors was filed in the clerk's office of said circuit court of appeals, in said cause, in the words and figures following:

United States circuit court of appeals, eighth circuit.

THE UNITED STATES OF AMERICA, APPELLANT,
vs.
THE NORTHERN PACIFIC RAILROAD COMPANY, The Northern Pacific Railway Company, and Edwin H. McHenry and Frank G. Bigelow, as receivers of the Northern Pacific Railroad Company, appellees.
} Assignment of errors.

And now in the foregoing entitled cause, and at the time of filing therein its petition for appeal, comes the said appellant, The United States of America, by Eugene G. Hay, special assistant United States attorney, hereunto lawfully authorized and directed by the honorable Attorney-General of the United States, and says that in the records and proceedings in the above-entitled cause there is manifest error in this, to wit, that the court erred:

First. In holding that the question as to what place The Northern Pacific Railroad Company actually selected as the eastern terminus of its road was a question of fact which was necessarily decided by the Land Department when it issued the patent sought to be canceled in this action, and is not open to the consideration of the courts until it is first made to

appear that the decision of the question by the Land Department was induced by fraud or mistake of fact.

Second. In holding that upon the facts of the record in said case The Northern Pacific Railroad Company never selected any other place than Ashland as the eastern terminus of its railroad; that it selected a point on Lake Superior in the city of Ashland as its eastern terminus, in 1884; that this selection was accepted and approved by the Land Department; that it had not forfeited or lost the power of selection when this choice was made, and this point in the city of Ashland is the eastern terminus of The Northern Pacific Railroad.

198 Third. In not holding that the land grant of The Northern Pacific Railroad Company had lapsed before the road of said company was built to Ashland, Wisconsin, and before said road had been connected with Lake Superior, except at Duluth, Minnesota, by the purchase of a half interest in the Lake Superior & Mississippi Railroad.

Fourth. In not holding that the land grant of The Northern Pacific Railroad Company had lapsed before any map of definite location of said railroad east of Duluth, Minnesota, had been filed by the said company in the office of the Secretary of the Interior or the Commissioner of the General Land Office.

Fifth. In not holding that The Northern Pacific Railroad Company could not lawfully extend the construction of its railroad so as to entitle it to lands under its land grant after the time limited by act of Congress for completing said railroad had fully expired.

Sixth. In not holding that The Northern Pacific Railroad Company had, by its various acts, selected Duluth, Minnesota, as the eastern terminus of its road, and thereby satisfied its land grant and exhausted its charter powers in that respect.

Seventh. In not holding that The Northern Pacific Railroad Company, by the contracts, agreements, deed, and lease set out as Exhibits "A," "A 1," "B," "B 1," and "C" of the bill of complaint in this case, and carrying out and performing all of the conditions thereof, and for a period of fourteen years operating its trains from Duluth to Thompson Junction over the road of which said company acquired an interest by said contracts, agreements, deed, and lease, did consolidate, confederate, and associate with a land grant railroad, as provided for in section 3 of the act of Congress of July 2nd, 1864, entitled "An act granting lands to aid in the construction of a railroad and telegraph line from Lake Superior to Puget Sound, on the Pacific Coast, by the northern route," and thereby select Duluth as the initial point or eastern terminus of said road.

Eighth. In holding that the building of a railroad by the Northern Pacific Railroad Company from its main line at Thompson Junction to Superior, Wisconsin, on Lake Superior, did not, under the

199 facts in this case, satisfy the land grant of said company.

Ninth. In not holding that the Northern Pacific Railroad Company had, prior to the passage, on August 28th, 1884, of the resolution of its board of directors fixing Ashland as its eastern terminus, by its acts selected Duluth as its eastern terminus and exhausted its charter powers in that respect.

Tenth. In holding that the eastern terminus of the Northern Pacific Railroad was fixed and established at Ashland, in the State of Wisconsin,

by the resolution of the board of directors of the Northern Pacific Railroad Company of August 28th, 1884, and by the construction of the railroad to that place.

Eleventh. In holding that the eastern terminus of the Northern Pacific Railroad could only be established by a deliberate intention on the part of the company to make the choice, the clear expression of that intention to the Land Department of the United States, and the acceptance and approval of that selection by that Department.

Twelfth. In not holding that Duluth, Minnesota, is the eastern terminus of the Northern Pacific Railroad.

Thirteenth. In not reversing the decree of the circuit court dismissing appellant's bill of complaint.

Fourteenth. In affirming the decree of the circuit court dismissing appellant's bill of complaint.

Wherefore the said appellant prays that the order and decree of the circuit court of appeals of the United States for the eighth circuit in the above-entitled cause, be reversed.

EUGENE G. HAY,
Special Assistant U. S. Attorney for the District of Minnesota, Solicitor for Complainant.

(Endorsed:) Original. United States circuit court of appeals. The United States of America, appellant, vs. The Northern Pacific Railroad Company, et al., appellees. Assignment of errors. Filed Sep. 15, 1899. John D. Jordan, clerk.

200 And on the fifteenth day of September, A. D. 1899, a citation was filed in the clerk's office of said circuit court of appeals, in said cause, the original of which, with the admission of service endorsed thereon, is hereto attached and herewith returned.

201 United States circuit court of appeals, eighth circuit.

THE UNITED STATES OF AMERICA, APPELLANT,
vs.
THE NORTHERN PACIFIC RAILROAD COMPANY, A corporation, The Northern Pacific Railway Company, a corporation, and Edwin H. McHenry and Frank G. Bigelow, as receivers of the Northern Pacific Railroad Company, appellees. } Case No. 1259.

Citation.

UNITED STATES OF AMERICA, *ss.*

To the Northern Pacific Railroad Company, The Northern Pacific Railway Company, and Edwin H. McHenry and Frank G. Bigelow, as receivers of the Northern Pacific Railroad Company—greeting:

You, and each of you, are hereby cited and admonished to be and appear at the Supreme Court of the United States, to be holden at the city of Washington, in the District of Columbia, within thirty days from the date hereof, pursuant to an appeal taken out of and allowed by the

United States circuit court of appeals for the eighth circuit, wherein the United States of America is appellant, and the Northern Pacific Railroad Company, a corporation, The Northern Pacific Railway Company, a corporation, and Edwin H. McHenry and Frank G. Bigelow, as receivers of the Northern Pacific Railroad Company, are appellees, to show cause, if any there be, why the order and decree of affirmance in the said appeal mentioned should not be set aside and corrected, and why speedy justice should not be done to the parties in that behalf.

202 Witness: The honorable Walter H. Sanborn, United States circuit judge, this 15th day of September, A. D. 1899, and of the Independence of the United States the one hundred and twenty-third.

WALTER H. SANBORN,
Circuit Judge.

[Indorsed:] Original. United States circuit court of appeals, eighth circuit. The United States of America, appellant, vs. The Northern Pacific Railroad Company et al, appellees. Citation. Due service of the within citation is hereby admitted at St. Paul, Minn., this 15" day of September, 1899. C. W. Bunn and James B. Kerr, solicitors for appellees. Filed Sep. 15, 1899. John D. Jordan, clerk.

203 United States circuit court of appeals, eighth circuit.

I, John D. Jordan, clerk of the United States circuit court of appeals for the eighth circuit, do hereby certify that the foregoing two hundred and two pages contain a full, true, and complete transcript of the record and proceedings, including the opinion of said United States circuit court of appeals, in the case of The United States of America, appellant, vs. The Northern Pacific Railroad Company et al, appellees, No. 1259, May term, 1899, as full, true, and complete as the same remain on file and of record in my said office.

I do further certify that the original citation in said cause, with the admission of service endorsed thereon, is hereto attached and herewith returned.

In testimony whereof, I hereunto subscribe my name and affix the seal of said United States circuit court of appeals, at the city of St. Louis, Missouri, this nineteenth day of September, A. D. 1899.

[SEAL.] JOHN D. JORDAN,
Clerk, U. S. Circuit Court of Appeals, Eighth Circuit.

(Indorsement on cover:) File No. 17522, U. S. C. C. of appeals, 8th circuit. Term No. 408. The United States, appellant, vs. The Northern Pacific Railroad Company, The Northern Pacific Railway Company et al. Filed September 28, 1899. Office Supreme Court of U. S. Received Sep. 21, 1899.

In the Supreme Court of the United States.

October term, 1899.

THE UNITED STATES, APPELLANT,
vs.
THE NORTHERN PACIFIC RAILROAD Company et al. } No. 408.

STIPULATION.

It is hereby stipulated by counsel for the parties to the above-entitled cause that the maps used therein in the court below, and which have been received by the clerk of this court, may be used in the argument and consideration of said cause, and that, in order to avoid unnecessary printing, the clerk shall reproduce only the map marked "Exhibit No. 3," being one of said maps showing the line of survey of the Portage, Winnebago & Superior Railroad, the others of said maps, with the exception of two, which are deemed unimportant, being already before the court in the printed record in the case of Andrew Doherty vs. The Northern Pacific R. R. Co. et al., No. 121, October term, 1899, which case is to be heard with this case.

JOHN K. RICHARDS,
Solicitor-General.
C. W. BUNN &
JAMES B. KERR,
Counsel for Appellees.

DECEMBER 27, 1899.

(Indorsed:) File No., 17522. Supreme Court U. S. October term, 1899. Term No., 408. The United States, appt., vs. The Northern Pacific R. R. Co. Stipulation as to map exhibits. Office Supreme Court U. S. Filed Jan. 6, 1900. James H. McKenney, clerk.

4—207*a*.

F
R. F. F.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., July 11, 1898.

I, Binger Hermann, Commissioner of the General Land Office, do hereby certify that the annexed map of definite location of the Portage, Winnebago and Superior Railroad from Bayfield to Superior, Wisconsin, received in this office November 10, 1869, with letter from Secretary of the Interior, is a true and literal exemplification of the original now on file in this office.

In testimony whereof I have hereunto subscribed my name and caused the seal of this office to be affixed, at the city of Washington, on the day and year above written.

[SEAL.]

BINGER HERMANN,
Commissioner of General Land Office.

(Here follows map, page 4.)

In the Supreme Court of the United States.

October term, 1899.

UNITED STATES OF AMERICA, APPELLANT,
vs.
NORTHERN PACIFIC RAILROAD COMPANY, The Northern Pacific Railway Company, and Edwin H. McHenry and Frank G. Bigelow, as receivers of the Northern Pacific Railroad Company, appellees.
} Stipulation.

The bill of complaint in the above-entitled action not stating in specific language the amount in controversy in said action,

It is therefore hereby stipulated and agreed by and between the parties thereto, through their respective solicitors, that the matter in controversy in said action does exceed one thousand dollars ($1,000) besides costs.

Sept. 15th, 1899.

EUGENE G. HAY,
Special Assistant U. S. Attorney for the District of Minnesota,
Solicitor for Appellant.
C. W. BUNN &
JAMES B. KERR,
Solicitors for Appellees.

(Indorsed:) File No., 17522. Supreme Court U. S. October term, 1899. Term No., 408. The United States, appt., vs. The Northern Pacific R. R. Co. et. al. Stipulation as to amount in controversy. Office Supreme Court U. S. Filed Jan. 6, 1900. James H. McKenney, clerk.

Case 408

Motion to Advance

Filed Oct. 27, 1899

SUPREME COURT U. S.
FILED
OCT 27 1899
JAMES H. MCKENNEY,
Clerk.

In the Supreme Court of the United States.

OCTOBER TERM, 1899.

THE UNITED STATES, APPELLANT,
v.
THE NORTHERN PACIFIC RAILROAD COMPANY et al. } No. 408.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

MOTION TO ADVANCE.

In the Supreme Court of the United States.

OCTOBER TERM, 1899.

THE UNITED STATES, APPELLANT,
v.
THE NORTHERN PACIFIC RAILROAD COMPANY et al. } No. 408.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

MOTION TO ADVANCE.

The appellant moves the court to advance this case and assign the same for hearing at a day convenient to the court, along with No. 121, *Andrew Doherty* v. *The Northern Pacific Railway Company*. The main question involved in each case is the same, to wit: In view of the action of the Northern Pacific under its grant, is its eastern terminus at Duluth and Superior City, Minnesota, or at Ashland, Wisconsin? The railroad company claims that its right of way and accompanying land

grant extends as far east as Ashland, Wisconsin. The Government contends that its line and grant ends at Duluth or Superior City.

The question is an important one, involving large interests, and all should be heard.

JOHN K. RICHARDS,
Solicitor-General.

In the Supreme Court of the United States.

OCTOBER TERM, 1899.

THE UNITED STATES, APPELLANT,
v.
THE NORTHERN PACIFIC RAILROAD Company et al. } No. 408.

APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

BRIEF OF APPELLANT.

STATEMENT OF THE CASE.

Speaking generally, the case appealed is a suit involving the question whether the land grant now belonging to the Northern Pacific Railroad Company extends eastward of, or lies wholly west of Duluth, Minn.

The United States filed a bill in the circuit court for Minnesota against that company, the receivers appointed to take charge of its property, and against the Northern

Pacific Railway Company, stating their relations to a certain small tract of land in St. Louis County, *Minn.*, situated more than 10 miles east of Duluth, viz, lot 5, section 29, township 54 north, range 13 west, claimed, and on April 22, 1895, patented as within the limits of the grant made to that company by act of Congress of July 2, 1864, to aid in constructing a road from Lake Superior to Puget Sound; and proceeding to allege that Duluth is the eastern terminus or eastern initial point of the grant and road, and that the patenting of this land was by inadvertence and mistake.

It may be well to say here that Duluth is very near the extreme end of the long finger, the "*fond* du lac," of Lake Superior which points westward in the direction of Puget Sound. The same may be said of the neighboring town of Superior; and the boundary line between Minnesota and Wisconsin runs into the extreme point mentioned and separates these two towns.

The bill quoted the granting act with a view to showing its description of the grant so far as concerned the eastern end; also provisos of the act supposed to have authorized and caused the establishment of Duluth as such end by means of arrangements with a land-grant company (the Lake Superior and Mississippi) having a grant and road reaching from Thomson (a place about 20 miles west of the lake) northeasterly to Lake Superior at Duluth, under a prior granting act of Congress of May 5, 1864; and also quoted section 8 of the granting act of July 2, 1864, conditioning every grant, right, and privilege bestowed upon the completion of the road within so many years, this time, as afterwards extended,

to expire in 1878. The bill alleged the filing of a map of general route by the Northern Pacific Railroad Company in 1865 (known as the Perham map and having an erased red line to the most eastern part of the lake in Wisconsin and an unerased red line to Duluth), designating Duluth as the eastern starting point. The provisos quoted were also supposed to show that prior grants, so far as the roads were upon the same general line, were to be deducted from that to the Northern Pacific Company.

The bill further alleges the filing of the map of definite location from Fargo, Dak., as far east as Thomson on December 12, 1871, and avers that from Thomson to Duluth the Northern Pacific road was upon the same general line as the Lake Superior and Mississippi Railroad, and explains the agreements with that company (under the provisos referred to), dated, one in 1870, and two in 1872, and one in 1876 (exhibits to and parts of the bill), and the proceedings under them establishing, as the bill seeks to show, the Northern Pacific line with a terminus at Duluth.

The bill then sets forth section 3 of a prior Congressional grant of May 5, 1864, one to aid in the construction of a railroad from Portage City or other places to Bayfield, and thence to Superior, and states the definite location of that road and the withdrawal of lands for it, Superior and Bayfield being, as the court knows, on Lake Superior, in Wisconsin, and the latter city far east of Duluth and near Ashland.

The prayer of the bill was for a reconveyance of the tract, the cancellation of the patent, and for general relief.

All made parties defendant duly appeared. The Northern Pacific *Railway* Company disclaimed all past or present claim to the land and asked to be dismissed; and the other two defendants put in a "joint and several" answer.

In this answer, which is quite long, after admitting divers allegations about the receivership, the language of granting acts, and the like, they denied that the line of the Lake Superior and Mississippi from St. Paul to Duluth, by way of Thomson, is northeasterly, and say it is more northerly. That a map of general route was filed by the company in 1865 designating Duluth as the eastern starting point was denied.

The answer then, admitting the agreements alleged, denied that they had the effect of establishing Duluth as the eastern terminus and discussed them at length, seeking to show that they were the result of the provisions in the granting act requiring the company to obtain the consent of the States through which the road was to pass and of the State laws giving the consent on conditions concerning a *branch* railroad.

The answer denied that the line from Thomson to Duluth constituted part of the main line; admitted that it was used for about ten years after 1872, and alleged that it was abandoned in 1881; denied that Duluth became or was the eastern terminus or initial point; alleged that lot 5 in question was duly selected on October 5, 1894, as indemnity in lieu of certain lands within the place limits of the grant, the selection being approved on the 13th of April, 1895, and denied that the lot, though situated more than 10 miles east of Duluth, is

without the limits of the grant. The answer denied that a mistake was made in conveying the land to the company.

The answer alleged that surveys were made by the company in 1866, 1867, 1868, and 1869 of what appeared to be practicable routes, commencing at different points on Lake Superior and extending westwardly therefrom, and that prior to such surveys neither the board of directors nor officers were possessed of sufficient knowledge to determine upon a feasible route; that thereafter, and before August 13, 1870, they duly located the *general route* from the mouth of the Montreal River, on Lake Superior (a place in Wisconsin as far east as the lake reaches in that State), westward to a point on the Red River of the North, and on that date transmitted a map accordingly to the Secretary of the Interior; that he duly approved the same and ordered withdrawal of lands along the line indicated, which was done. The even-numbered sections were raised in price to $2.50 per acre, and large quantities disposed of by the United States at that price.

A *definite location* from Thomson east to a point only 8 miles west of the mouth of Montreal River is alleged, the map being transmitted to the Secretary on *July 5, 1882*, and being approved by the Commissioner of the General Land Office. This map is an exhibit and part of the answer. In 1882 and 1883 withdrawals of lands took place, including lands in Wisconsin east of Duluth.

It is further alleged that on *August 28, 1884*, the board of directors of the company adopted a resolution purporting to fix and establish "the eastern terminus or the point of beginning" at Ashland, Wis. (a place in

Wisconsin far east of Duluth and Superior); and that this was transmitted to the Commissioner of the General Land Office, who approved the same, and ordered the release from withdrawal of all lands east of Ashland; and that Ashland is on the line of definite location of July 6, 1882, about 12 miles west of the eastern end thereof.

It is alleged that the whole road from a point on Lake Superior, in Wisconsin, to wit, Ashland, to Puget Sound was "duly" constructed "in all respects as required by said act of Congress" and duly accepted by the President as provided in the granting act.

Due construction of the portion between Thomson and Ashland on the said line of definite location and examination by commissioners and approval of it in three sections are alleged—approval as far east as Bluff Creek (at Superior City, Wis.), September 16, 1882, and of the other two portions in 1884 and 1885.

The location of lot 5 within the 30-mile and beyond the 20-mile indemnity limits of the grant was alleged; that it was 10 miles east of Duluth (it was east of Superior City also, Rec., p. 98) admitted, and it was alleged that it was, with a full knowledge of the facts, selected by and conveyed to the company in accordance with the approval of the selection by the Secretary of the Interior, as indemnity in lieu of place lands lost.

It was then alleged that the Northern Pacific Railroad Company called upon the Lake Superior and Mississippi Company in 1873 for an agreement construing the agreement (mentioned in the bill) of January 1, 1872, so that the same should not be held to intend to fix the eastern

terminus at Duluth, and that thereafter in the same year the latter company, by a resolution of its board of directors, agreed with the former company that the agreement of January 1 should not be so held.

It was then alleged that in 1874 the two companies made an agreement (an exhibit to the answer) whereby the Northern Pacific Railroad Company surrendered all rights under the contract of lease of May 1, 1872, mentioned in the bill of complaint; also that the company surrendered the lines so leased.

It was denied that the relief is due the complainant; whatever was not expressly admitted or otherwise answered was denied, and the defendants declared themselves ready to aver and prove all the matters and things in their answer. There was a general replication saying that complainant would aver and prove its bill to be true and sufficient and the answer to be untrue and insufficient, wherefore the complainant prayed relief as in the bill set forth. This was followed by a stipulation as to the facts.

This statement, chiefly setting forth official documents, and the like, is extended, but simple. Its contents are for the most part shown by the index to the record referring to pages between 102 and 155, and to page 157.

The decision of the trial court was that the bill should be dismissed, and that of the court of appeals that the decree below should be affirmed without costs to either party. And the case was duly appealed to this court and ordered to be heard with that of *Andrew Doherty* v. *The Northern Pacific Railway Co. et al.*, No. 121 of the present term.

That is a case also involving a controversy as to the eastern beginning of the grant, Doherty claiming compensation for the use of his land lying east of Duluth and the company claiming to have been granted a right of way over the land while it belonged to the United States, that is, before Doherty owned it.

ASSIGNMENT OF ERRORS.

1. The court of appeals erred for the reasons stated in an assignment set forth on pages 192–194 of the record and in points number 1 to 8 italicized in the argument hereinbelow.

2. In not holding that the smallest grant reconcilable with the act of July 2, 1864, was the grant made by Congress.

3. In holding the *opposite*.

4. In not holding that constructing the road to or from the lake at Superior City exhausted the so-called power to "select an eastern terminus."

5. In not holding that that power was exhausted by so touching the lake at Duluth.

6. In holding that the company could locate road and thereby acquire title to land after the time expired for completing the road.

7. In holding that title to this indemnity land east of Duluth was, when that time expired, already in the company, subject only to a condition subsequent.

8. In holding that the executive officials were authorized to approve locations and constructions and selections of lieu lands east of Duluth, made subsequently to that

time, with the same effect as if the time had not expired, or any effect.

9. In holding that the Land Department was authorized to waive, and did waive, the rights of the Government established by Congress in the act of July 2, 1864.

10. In not holding all proceedings by the company and land officials subsequent to the time referred to (not based on previous timely proceedings) in pretended execution of that act, prohibited, void and of no effect.

11. In holding that the question of noncompliance with the terms of the grant, so far as this affects the land in question, is not in issue, but that nevertheless compliance is proven.

12. In holding that such noncompliance does not justify the decree prayed for, because the bill did not allege it.

13. In not holding that the company could not validly and effectively locate its road or eastern terminus by proceeding as authorized by the act of 1864 and without regard to the approval or disapproval of the Land Department.

14. In holding that it could do so without proceeding as authorized by the act of 1864, if the Land Department approved.

15. In not holding that the arrangements and dealings and representations with regard to Duluth and the Lake Superior and Mississippi Company's road estopped the appellees from denying that Duluth became the eastern terminus.

16. In holding that those arrangements were merely

"forming running *connections* on fair and equitable terms."

17. In holding that "its charter" gave the company the "unlimited right to choose any *eligible point* on the lake in the State of Minnesota or the State of Wisconsin."

18. In saying that we are seeking to set aside the solemn judgment of a tribunal we have entrusted with the power and given the duty "to hear and determine the very questions whether or not the corporation *was entitled* to do these acts and thereby earn these lands, *notwithstanding the fact* that the time fixed for their performance had passed," and suggesting that, if we are, we have no right to set aside such a judgment.

19. In not holding that Congress intended what would have been the grant of this tract, or lands in place opposite this tract, to be omitted from the grant made because opposite a road on the same general line having a prior grant to aid the building of a road on that general line.

ARGUMENT.

The act of Congress of July 27, 1864, made the largest of all the railroad land grants to a company owing its corporate existence to the first section of that act, and conditioned all rights, privileges, etc., upon the beginning of the road within two years, the building of 50 miles per year after the second year, and the completion of the road within so many years. As afterwards extended, the limit for completion is not claimed by the appellees to be later than 1878 or 1880. Supposing Ashland the true and only eastern end, it is not pretended

that there was a completion of the part east of Duluth before the time expired or that there was even a definite location east of Duluth before that time.

The opinion of the court is that it is true that it can correct errors of law by the Land Office; but, firstly, that the granting act intended the company to have a right to any good terminus on the lake it happened to want; secondly, that it did not lose this right by exhausting it at Duluth or Superior, for it did not select either; thirdly, that it did not lose it in 1880 under section 8 of the act, that forfeiture section requiring an act of Congress or judicial decree to forfeit or impair any of the company's rights; fourthly, that conceding a forfeiture operative from 1880, provided suit should be brought to enforce it, the Government can not recover here for that reason, because—

1. This is the wrong kind of a suit, not having been begun expressly to enforce section 8;

2. The acts of the Land Office have estopped the Government to say it has not waived section 8;

3. Nonaction, that is, failure to bring suit or pass a forfeiture law, has estopped the Government to say that;

4. The Government did waive section 8, through the acts of the Land Office, which was authorized to waive it.

We do not mean that the court expressly says that the unauthorized acts or the neglects of the officials estop the Government, but the obvious meaning seems to be the same as if it had said this.

It is settled that nonaction does not waive a forfeiture, even in the case of an individual grantor; but it is a new proposition that the Land Office (and even this court in

a suit to cancel a patent) must wait for an act of Congress or judicial decree before it can take any notice of the failure under section 8, but yet, if it takes no notice, the Land Office thereby waives the forfeiture or estops the Government from asserting it here or elsewhere.

Admittedly, then, the company is seeking to retain land it was to earn by building the road within a fixed time, which expired without compliance with that condition; that is to say, it is retaining land Congress did not agree to give or intend it to have under the present circumstances.

The appellant thus starts with the advantage that, technicalities aside, the land justly belongs to it and was not owing to the company under the contract.

The court of appeals devotes much space to a strenuous if not convincing argument to break the effect of this fundamental fact and the law arising from it—that the company failed to do those things it agreed to do in order to get or to retain the land it is seeking to deprive us of. The court sees no equity in the Government's complaint, and sees no iniquity in the long-hatching scheme of this corporation to extend its imperial domain many miles to the eastward of its legal boundary and of an all-sufficient shipping point on Lake Superior, connected by rail with Puget Sound, even if we are right in saying that boundary is to be drawn through Duluth.

In fact, the court thinks the company's wanting some more road, with a proportionately enormous quantity more of land, extremely magnanimous and meritorious. (Rec., p. 188.)

But let us pass to a discussion of details. We submit—

I.

That that construction of the granting act, not being a wholly unreasonable one, which gives the smallest grant is the true legal construction, and that construction makes the eastern boundary of it a line drawn through Duluth in Minnesota or some neighboring point in Wisconsin like Superior City.

A portion of section 1 of the granting act of July 2, 1864, is as follows:

> And said corporation is hereby authorized and empowered to lay out, locate, construct, furnish, maintain, and enjoy a continuous railroad and telegraph line, with the appurtenances, namely, beginning at a point on Lake Superior, in the State of Minnesota or Wisconsin; thence westerly by the most eligible railroad route, as shall be determined by said company, within the territory of the United States, on a line north of the forty-fifth degree of latitude, to some point on Puget's Sound, with a branch, over the Columbia River, to a point at or near Portland, in the State of Oregon, leaving the main trunk line at the most suitable place, not more than three hundred miles from its western terminus, etc.

This court has held it to be law that "when the termini of a railroad are mentioned, for whose construction a grant is made, the extent of which is dependent upon the distance between those points, the road should be constructed upon the most direct and practicable line.

No unnecessary deviation from such line would be deemed within the contemplation of the grantor, and would be rejected as not in accordance with the grant." (*St. Paul & Pac.* v. *N. Pac.*, 139 U. S., 13.)

The principle here relied upon is one often stated and applied by this court and familiarly known by Congress when this grant was made. In *Dubuque and Pac. R. Co.* v. *Litchfield* (23 How., 66), concerning a grant to Iowa to aid in the improvement of a river, we find:

> All grants of this description are strictly construed against the grantee; nothing passes but what is conveyed in clear and explicit language; and, as the rights here claimed are derived entirely from the act of Congress, the donation stands on the same footing of a grant by the public to a private company, the terms of which must be plainly expressed in the statute, and if not thus expressed they can not be implied.

This is approved in the case of *Leavenworth, etc., R. R. Co.* v. *United States* (92 U. S., 740), where the court says of a grant:

> It should neither be enlarged by ingenious reasoning nor diminished by strained construction. The interpretation must be reasonable, and such as will give effect to the intention of Congress. This is to be ascertained from the terms employed, the situation of the parties, and the nature of the grant.
>
> If these terms are plain and unambiguous, there can be no difficulty in interpreting them; but if they admit of different meanings—one of extension and the other of limitation—they must be accepted in a sense favorable to the grantor. And if rights claimed under the Government be set up against it,

> they must be so clearly defined that there can be no question of the purpose of Congress to confer them. In other words, what is not expressly given or by necessary implication, is withheld. (*Dubuque and Pac. R. Co.* v. *Litchfield, supra; Rice* v. *Railroad Co.*, 1 Black, 380; *Charles River Bridge* v. *Warren Bridge*, 11 Peters, 420.)

See also *Leighton* v. *United States* (161 U. S., 291); *Barden* v. *North. Pac.* (154 U. S., 325); *North. Pac. R. R. Co.* v. *Sanders* (46 Fed. Rep., 250); *Coosaw Mining Co.* v. *South Carolina* (144 U. S., 562); *Slidell* v. *Grandjean* (111 U. S., 437, 438); *Delaware R. R. Tax Case* (18 Wall., 225); *Whitney* v. *United States* (167 U. S., 529). In this last case, in connection, it is true, with a proposition as to the burden of proof, but doubtless having in mind the same principle, the court said:

> So long as the description is reconcilable with the smaller grant, and with a pueblo located upon the mesa of Cochiti, the Government is entitled to the benefit of that construction.

Referring to the grant in this case and the map of this Northern Pacific road to Puget around by Portland, the court says: "The authority given to the company to adopt the most eligible route did not authorize it, by a map of general route, to cover an unlimited extent of country north of the forty-fifth degree of latitude. *On the contrary*, as said in *St. Paul and Pacific R. R.* v. *Northern Pacific* (139 U. S. 1, 13), when the termini of a railroad are mentioned," repeating and applying to this grant all of the above-quoted language from that case (*United States* v. *Northern Pac.*, 152 U. S., 292).

Now, it is clear that this grant can be made larger in two ways—by bending the line of route from a straight line in search of a practicable or of a more eligible route, and secondly, and independently, by putting the termini thereof wider apart than the nearest practicable termini. If it was intended to permit it to be enlarged in the former way, that is no reason why it was also intended that it should be enlarged in the latter.

It is clear that the *terms* of the grant do not purport to authorize the latter enlargement. The grant does not say "from the most eligible railroad terminus," but merely from a point on Lake Superior.

It is also clear that the *terms* of the grant, "thence *westerly by* the most eligible railroad route," etc., can be fully complied with without permitting the termini to be farther apart than the nearest practicable termini, provided we allow a choice between the nearest practicable point in Wisconsin and the nearest in Minnesota. And, further, even if the "some point on Puget Sound" is to share in the supposedly flexible eligibility of the route, that does not prove that the eastern initial "point" was intended to be set 60 miles farther east than the most westerly practicable point.

The omission of Congress to name two places or towns on Lake Superior proves nothing against this construction, because the most western available shipping points in Minnesota and that in Wisconsin were little known in 1864.

Is there anything in "the situation of the parties" or in "the nature of the grant" to require a more extended meaning in the case of this already enormous grant?

Would not the manifest aim of the grant—to connect by rail the waters of Puget Sound with those of Lake Superior—be fully accomplished by a road "westerly" from Superior City or Duluth, the two afterwards ascertained shipping points in Wisconsin and Minnesota nearest to Puget?

If the court of appeals is right in believing it a conceivable intent of Congress that in making this particular grant Congress desired "as much railroad as possible," would it be right in affirming that to be the only interpretation, or the only reasonable interpretation, without doubt or choice as to any other?

We submit that in confining the company to ascertaining the westernmost practicable point—that is, we willingly concede, a place available for connecting with vessels, such as Superior City or Duluth, with a choice between such a place in Wisconsin and such a place in Minnesota, and thereby confining the grant to the smallest dimensions reconcilable with the act of 1864—we give this law of Congress the proper construction. In fact, there is not as much reason to say that the line of a road between fixed termini must be the most direct practicable, when it is expressly made determinable by the company or State, as there is for saying that the termini of the grant, which are simply described as a point on a named lake having a long, narrow projection to the westward and some point on a sound westward of it, without anything said about a choice of points, for eligibility or otherwise (except a choice between Minnesota

and Wisconsin), shall be the nearest practicable points, the one to the other.

The principle we have mentioned seems to render the boundary of the grant certain as calling for either Duluth or Superior City (both found to be shipping points), as the eastern limit of the grant, westerly from which it may *or may not* be that the road was intended to vary its direction in some not "unlimited" way, from the direct practicable line, to some point on Puget, so far as necessary to give the route "the most eligible" deflections.

We say may not be, because the view taken in *St. Paul and Pacific* v. *Northern Pacific*, above quoted, seems to be that the vague word "eligible" was not intended to make this road differ from those which must be upon the most direct practicable lines.

This construction seems to have been understood or agreed upon between the company's president and the Commissioner of the General Land Office prior to June 22, 1865 (Record, p. 105–106), for the Perham map had then been confined to the line to Duluth, the other line having been erased, evidently with the knowledge and consent of, if not by, President Perham, who, as president of the company was properly regarded as representing it, without our now being able to show a formal resolution directing him, no timely repudiation being shown. For the Commissioner tells the Secretary: "Mr. Perham, the president of the company, has called attention to the matter, and, submitting it, I have the honor to state * * *. Now, in this view the Commissioner reports that no withdrawals should be made

until the map of actual survey, authenticated as indicated, shall be filed in the district and General Land offices. This may be done *starting from the cul de sac of Lake Superior, the eastern initial point of the route,* and stretching thence westward to the western boundary of Minnesota, the lines of the public surveys having been that far established."

II.

That the power given to construct a road beginning at Lake Superior was exhausted when a road beginning at Lake Superior was constructed by building to the Lake at Superior City, Wis., no matter with what intention or legal opinion as to the effect of so doing, this was done, or what opinion was afterwards formed or expressed as to the effect of the act.

We shall not dwell upon the strange notion that the legal effect of an act done by the Northern Pacific Company, so far as the relations of the Government and company were changed by it, could be altered by a subsequent resolution of the same or another company, stating what that legal effect as between the Government and Northern Pacific Company was or was not.

A corporation is said to have no soul. It is an automaton, enabled to do some few acts. It exhausts its power by doing one of those acts, if the act is of the kind not intended to be repeatedly done, and we do not understand that, in the case of a physical fact, such as a railroad built or a map filed, we are to look beyond for an intent.

Suppose there was authority to go east of Superior City, if the company chose.

What the company had power to do was simply to "lay out, locate (generally and definitely), construct, furnish, maintain, and enjoy a continuous railroad and telegraph line, with the appurtenances, namely, beginning at a point on Lake Superior, in the State of Minnesota or Wisconsin, thence westerly," etc.

To construct and complete a railroad touching the authorized terminus is not to make a preliminary and tentative survey or choice of routes. It is to fully perform the final act authorized to be done in the matter of producing a railroad, and certainly more truly final than filing a map of definite location, which, as this court has held, can not be altered by the grantee company.

When it had *constructed* a road answering that description, its power to construct *was exhausted by use*. All the lower courts seem to admit the *principle* that such an authority once used is exhausted. The company was not to construct several roads from Lake Superior or a road from several points on Lake Superior, but a road from one point, meaning, we may admit, a harbor or shipping point, its touching or not touching the lake at other than such places being, therefore, a matter of no consequence.

It is quite immaterial what its private views or designs may have been, or how and when they may have changed, if corporations are supposed to have such things, concerning its so-called right "to select an eastern terminus." The final unalterable consummation of the whole project was to be the built *railroad*.

What Congress empowered it to do was to *construct a road* from Lake Superior and, *incidentally* and *preliminarily*, to lay out and locate from "a point on Lake Superior" that road which it was to construct. Unlike the companies having shorter grants, the courts have held that these Pacific road companies were not required to locate, etc., the whole road before acquiring rights. (*U. S.* v. *Southern Pacific R. R.*, 146 U. S., 596.)

As soon as the constructed road began at a point on Lake Superior and ran thence westerly, the power to construct at the eastern end, we say, was exhausted, no matter what the company then or later thought it might, could, or should do; and, of course, there remained no power to definitely locate *other road farther east*, which there remained no power to construct. The incident perished with the principal thing.

The road to Thomson from Superior City (25 miles) must have been practically, or quite, finished as soon as the map was filed, on July 5, 1882, for it was built in *1881* and 1882, and the examination of it as part of a section of 225 miles was completed and approved by September 16, 1882. It would, however, be a case of *de minimis non curat* if a few days intervened after the filing of the map (which purported to reach still farther east) before the completion of the road to Superior.

We do not mean that the power to locate at all perished, if there had been (as the record indicates with reasonable clearness) no location by map filed east of *Thompson* prior to the construction to Superior City; but that the power to locate *farther east than Superior*

City shared the fortunes of the power to construct farther east, if it ever existed, which we have just denied in point No. 1.

III.

The company was authorized to build the whole road or take in sections of it by consolidation, confederation, or assignment with or from other companies, and sections so taken in were, of course, to be regarded as much part of its line as those built by the company; therefore, when the company reached Lake Superior at Duluth, in consequence of its arrangements with the Lake Superior and Mississippi Company, the power to extend a road from a point on Lake Superior westerly was as much exhausted as if that part of its line had been built by the Northern Pacific Company.

That building and the other contemplated means of becoming able to offer the Government a railroad under the contract of the company would have the same effect in exhausting its legal authority appears to be a self-evident proposition.

The court of appeals seems to us to give a narrow construction to the provisos of the granting act little consistent with its broad construction of the rest of it and of the law of Minnesota requiring a branch road. But admitting it to be true that the act contemplated a road sufficiently controlled by the Northern Pacific Company to respond to all demands of the Government and public for transportation, yet it is obvious that "assignment" is one means of obtaining this, since in case of assignment the Northern Pacific Company itself

would be the owner and be there to respond to all demands.

But that company did get an assignment, quite sufficient for all its own and all the Government's and all the public's purposes, and thereby completed its line from a point on Lake Superior in accordance with the act of 1864 precisely as if it had built to the lake. We insist that it could not thereafter build or locate it from *another* point on Lake Superior.

There was no object in requiring the company to obtain an assignment of *all* the interest of the prior company, so far as the routes should be upon the same general line. The other company was to be a land-grant company with a road only for a short distance, perhaps, paralleling the Northern Pacific, and the Government did not want the former road to give up *all* its interests—its grants, franchises, etc.—and so incapacitate itself from running its own trains between *its* termini and carrying mails, troops, etc. The reasonable construction is that the provision was intended to make the duty of the Northern Pacific Company less onerous by authorizing it to make use of roads already built or rights already conferred, in view of the fact that the land grant was in any event to be deducted along this part of its line paralleled; and that an assignment (though not of all the grants, franchises, privileges, of the other company along that part of its line) would be authorized, if it gave the assignee a railroad along there in such way and to such extent as to be capable of performing, and directly subject to, all those obligations of the company to the

Government and to the public contemplated by the act of 1864.

And this view is strengthened by the general tenor of the proviso, mentioning as many as four different ways in which the Northern Pacific Company could get the benefit of the road contemplated by the prior granting act.

Now, an assigned ownership of the railroad or track *per my et per tout* (such as is proven) would answer all the Government's purposes as well as one simply *per tout*, and much *better*, for this would less interfere with the other land-grant company's accomplishing its own object and service to the Government and the public.

We have examined the cases cited on record, page 181 and top of page 182, in search of some objection to this point and some support for theories of the court set forth on those pages, but find nothing of either kind. The Pennsylvania case says "at or near" does not mean "at" only. The Massachusetts cases are ruled by statutes. The one in 1 Gray, at page 353, gives some English and other cases showing the law, aside from statute alteration, to be as we state it. The case in 118 U. S. and that in 143 U. S. are distinctly in our favor, and that in 171 U. S. merely says that a *private party* can not complain of an altered route over public land.

But it is suggested that all this going to Duluth was to comply with Minnesota law requiring a branch to be in that State, and that the Wisconsin law made it inexpedient to settle upon a Minnesota town like Duluth, the terminus.

Point No. 2, above, involves no dispute as to whether the company was acting under the law of 1864 or whether

what it did was in strict compliance with it, but only whether the company *could afterwards withdraw* the act and do it over again farther east than *Superior*. But here we are told there were two governments, the United States and Minnesota, authorizing, one a main and the other a branch line to the lake, and that when we see a line from Thomson to the lake at Duluth, it may be only the *branch* line and not the main line.

The consent of Minnesota to the building of the road was given with the condition that should the company "elect to make the eastern terminus of said road east of the eastern boundary of the State of Minnesota," it should construct or cause to be constructed a line of railroad from "the said main line to the navigable waters of Lake Superior."

We may remark in passing that electing or selecting an eastern terminus, branch line and main line (in the east) are phrases belonging to this Minnesota statute and all quite unknown to the act of Congress 1864.

Wisconsin shortly after gave her consent, and re-enacted and vested all the rights and powers in Wisconsin given by Congress in the Territories, and with no condition, except that no company chartered by Minnesota was "to use or enjoy any of the privileges hereby granted to the Northern Pacific Railroad Company to be exercised in the State of Wisconsin," nothing in the act to prevent the company, after building through Wisconsin, from making such contracts for connections with Minnesota roads as it deemed proper.

Inconsistently with this, it afterwards, in 1870, sought to condition its consent upon certain things to be omitted

in the way of construction in Wisconsin, passed an act, March 25, 1872, stating the "further condition" that the company should construct and maintain "to some point on the southwesterly shore of the *Bay* of Superior, between Nemadji and Connors Point, a line of railroad connecting with and continuous to the main line of said Northern Pacific Railroad, by a route running south of St. Louis River from the junction of said Northern Pacific Railroad with the Lake Superior and Mississippi Railroad, intersecting the western boundary of Wisconsin at some point between the St. Louis and Nemadji rivers, and running thence all the way in Wisconsin between said rivers, and shall also construct and forever maintain, at some place where said railroad shall touch the Bay of Superior, between the said Nemadji and Connors Point, sufficient docks," etc.

All of which meant that on March 25, 1872, it was required to build a road from Thomson, Minn., to some point at or near Superior City, Wis.

In 1870 the company had agreed to go over the Lake Superior and Mississippi to the lake at Duluth, and not to build any other road east of that railroad north of Wyoming before it completed its road to the Missouri River, and on January 1, 1872, had purchased an undivided half of the railroad of that company from Thomson to Duluth.

The recitals in the deed show clearly that any other intention than to make Duluth the lake terminus was an afterthought, whether induced by the Wisconsin law or not is unimportant. Moreover, this going to Duluth

over the L. S. and M. was not constructing or causing to be constructed a road in Minnesota, as required by the Minnesota law (unlike the Wisconsin law, Rec., p. 91), but *was* getting an assignment of interest in a road already existing as authorized by the act of Congress. Neither was there anything in the Minnesota law to require such an early "compliance" therewith, especially as the branch road was only to be built after and in case the company should elect to make its eastern terminus in Wisconsin, a question which we are now told it never fully settled until 1884.

In a case in which the facts are peculiarly within the knowledge of the defendant, slight and sometimes no evidence is required to place the burden of proof upon him. We show here striking indications of an intent to make Duluth the eastern terminus. If it is a question of intent, we show enough, and more than enough, to prove that the defendants had that intent; and what is there to overthrow this? Are the minutes of the company produced for that purpose as they are for others? Are officials, acquainted with its private books and business, sworn to show that a different intent accompanied the acts referred to? Nothing of the kind. An intent to select Ashland in 1884 is sought to be shown (no one dreamed of denying it), which intent, of course, is quite consistent with an intent to select Duluth at some long prior date. The presumption is natural and warranted by law that the knowledge peculiarly within the breasts of the defendants was carefully kept there for the reason that it rather supported than overthrew the case of the complainant.

Even if not so, must we demonstrate the private intent of this corporation beyond a reasonable doubt, or is it not to be taken as existing or not according to the preponderance of probabilities?

No strenuous opposition is made to our theory as to what was intended; but it is supposed that Duluth could be made the terminus on January 1, 1872, or sooner, and then cease to be so; or rather, the court of appeals (though not the trial court) is not satisfied with only the intent, the assignment, and the actual use of the road under it. It insists upon some kind of a ceremony, such as the resolution of the board of directors in 1884, communicated to the Secretary of the Interior. We, on the other hand, deny that even the intent makes any difference, and say that, if the act of Minnesota was complied with, what was done was no less a compliance with the act of Congress. Were it now to the interest of the company to say so, we should be at a loss for any answer to that proposition. If it filed what was a map of definite location, it could withdraw it and file another on showing that Minnesota having required it to file what would be a map of definite location within a certain time, it may possibly have been just trying to satisfy Minnesota.

The Government understood in July, 1870, that Duluth was the terminus, for it passed an act of Congress to survey the grant on the supposition that there was no doubt on that point. The fact had been notorious. The land office had understood on June 22, 1865, that Duluth was to be the terminus. The Government did not need a map of this part of the Lake Superior and Mississippi route to be furnished by the Northern Pa-

cific Company, in order to find Northern Pacific lands or deduct the amount of the other company's grant between Thompson and Duluth. Even if it had needed either, however, that would not authorize any second completing of the road farther east or any locating elsewhere than to Duluth. The granting act *required no ceremony* in the case of an assignment from an earlier grantee, no second map, no second approval of construction, nothing but to get the road by the assignment. That strip of road was, then, *pro tanto*, a complete compliance with the obligation to offer the Government and public a railroad, within the meaning of the granting law, and became at once part of the Northern Pacific road. The law did not require any approval of such assignments by anyone. In short, the court of appeals has conjured up something separate and apart from anything in the act of 1864, attended with requirements, conditions, and formalities it fails to provide for, something the court calls "the selection of an eastern terminus." This is legislating, not adjudicating. No one, of course, could add one iota to the requirements and conditions the act imposed upon the company.

We submit that the company could neither stand forever hesitating, so that the road to Duluth could be a Federal road or a State road whenever and as often as might suit the company, nor, having reached the lake at Duluth by that assignment, and especially after acting for many years as though that were the terminus, thus giving rise to many alterations in the Government's position as to land sales, surveys, etc., afterwards proceed to the lake at another point, with no better reason

than to get more business and, *if possible*, more public land.

We shall not prolong the discussion under this head by repeating the argument made below, that there was a consolidation, confederation, or association, but shall merely call attention, in passing, to the complete control which another agreement than that of January 1, 1872, gave the Northern Pacific Company over this strip of road; a control surely ample to answer all purposes of Congress without insisting upon the complete obliteration, so far as that piece of road is concerned, of any company but the Northern Pacific.

But, as already remarked, the court of appeals practically admits the facts we rely upon, and even the intent which it requires and we think utterly immaterial, merely disputing that they prevented a change of mind and the ultimate excursion to Ashland in 1884.

We say, on the contrary, that when the *acts* of the company gave to the Northern Pacific trains for one day or one hour a road "from a point on Lake Superior" to the far West, the eastern end of the Northern Pacific route was finished beyond the power of anything but Congress and the company together to alter it.

IV.

That if propositions 1, 2, and 3 are erroneous, if there was power given to locate and build east of Duluth, or to Duluth, as the company might decide, no right to lien lands east of Duluth had passed when the time limited for completing the road, being a fortiori the time limited for definitely locating the road, including termini, expired, and no right

east of Duluth (or Superior) could afterwards be acquired. To say in a law or contract that, in a certain event, all rights acquired by a party in pursuance of its authorizations are to be forfeited, is to say also that one does not intend to authorize him to go on acquiring more of the same species of rights.

There was a time limit fixed in the Northern Pacific grant, within which the road was to be finished.

That time expired before the map of definite location of July, 1882, eastward of Thomson's Junction was filed; and when it expired (1878 or 1880) the road extended no farther east than Duluth, if so far.

Is it not evident that the extreme limit of time for building the road would not have been allowed to expire without even a map of definite location east of Thompson's Junction if the company had had any faith in its supposed right to a land grant reaching all the way to the Montreal River?

Is it not evident, also, that had it been deemed necessary or advantageous to this company to show a compliance with the act of 1864 in the matter of time, the point would have been successfully made that the company, or the law for it, had chosen going to Duluth as such a compliance, or that going to Superior as early as 1881 was a compliance? And are we to say that an act of the company did not bind the company for no better reason than that the present law case finds the company arguing that it did not mean to do what it did do?

The company might very naturally, in a map of general route, go east across Wisconsin, for the reasons,

among others, that the capabilities of Superior, etc., as possible shipping points were at first not absolutely certain and because the company could lose nothing and might possibly gain by so doing.

But, aside from its own views, we submit that it was beyond the power of the company to locate the grant after the *time* for completing the construction of road expired; that, even conceding that it could have gone on to Ashland or farther, as it might see fit, it did not do so within the time limited for it to act in; wherefore it is not in the position of a grantee with title lost upon breach of condition subsequent, so far as this end of the grant is considered, but in the position of a grantee of a float, who, within a given time, could locate *the grant* to any terminal point along a lake shore, so as to make the land 10 miles long, or 15 miles long, or 20 miles long, but who, as a matter of fact, let the time for locating run out, with no pretense even of having located beyond the 10-mile terminal point. This would be true even were we discussing place limit lands, instead of lands title to which would not pass before selection and approval.

Just after the first contract with the Lake Superior and Mississippi Company about Duluth, Congress appropriated money to survey "the public lands *within the limits of the land grant to the Northern Pacific Railroad Company* in a direct line extending *from Duluth*, on Lake Superior, to Georgetown, on the Red River of the North." (Act of July 15, 1870.) And thereafter the trains of the Northern Pacific Railroad Company sped through Thomson to Duluth until after the time for completing the road expired in 1880. (We shall not pause here to

discuss the question of an estoppel caused by altering the position of the grantor as a result of what the company did, represented, and accepted between June 1, 1865 and 1882, in connection with Duluth.)

But suppose the time expired with or without a failure to complete to the lake by going to Duluth. Suppose, also, there was a grant as claimed, not certainly *going* east of Superior City, but to go east or stop there *at the option of* the grantee, can the *title* to any lands or grant east of it be said to be in the grantee, the time having expired, not simply for locating a mere float of a *certain* quantity or length, but for electing whether to go east and what distance east to go?

Shall we say that *title* to lands east of Superior City (or Duluth, if preferred), the westernmost point within the requirements of the grant, passed *in præsenti*, accompanied only by a condition *subsequent*, or shall we say that all the company ever had was a *right* to acquire lands there, if it so elected to do, which expired when the time referred to expired? And shall we say the former, when it had not even elected (as the court of appeals insists) whether it would elect a point in Wisconsin rather than one in Minnesota? Under the circumstances, were not these elections and a definite location conditions precedent, or at least prerequisites, to the vesting of *title* to lands or grant east of Superior City?

After the grantee of land, with a right to choose which land within a given time, fails to choose, and fails to perform his covenants, must he not thereafter, if he is to get anything, be content with a choice by the grantor,

which the law would presume in a case like this, especially as the lands differ chiefly in quantity, to be a choice to give the smaller tract? (See Viner's Abr. Election, § 11.)

Even in the case of an ordinary float between fixed termini, what becomes of it when the time for location has run out, so that there is no longer any power to locate?

The dicta in *Schulenberg* v. *Harriman* say nothing about the power to definitely locate, and so acquire title from the grantor, continuing after the time for constructing and completing expires. That case does not discuss how a float, or how some of the numerous and various other "grants, rights, and privileges" are (or what requires them) to be reentered, or anything but the effect of an alleged condition subsequent accompanying an alleged fee title to particular lands. It argues that, owing to old feudal doctrines about livery of seisin and investiture and the ceremony of reentry or divestiture, such a fee title, duly vested, remains vested until that ceremony of reentry is performed. But all that is no reason why an executory authority to acquire titles is not instantly ended when the time impliedly limited for exercising it expires.

Moreover, it was the author of the opinion in *Schulenberg* v. *Harriman*—a leading case on the subject of passing of title *in præsenti*, granting acts being obligatory as laws, their effect as such where a private grant would fail, etc.—who said:

> Some reference should be made here to the language used in the cases of *Deffeback* v. *Hawke* (115 U. S., 392) and *Davis* v. *Weibbold* (139 U. S., 507),

as it is contended that it is in conflict with the views expressed in the present case. If so, the writer of this opinion, who was also the writer of the opinions in both of the cases cited, must take the responsibility of any conflict with the views now expressed. *It is more important that the court should be right* upon later and more elaborate consideration of the cases than consistent with previous declarations. *Those doctrines only will eventually stand which bear the strictest examination and the test of experience.* (*Barden* v. *North. Pac.*, 154 U. S., 321.)

Is it not consistent with prior decisions of this court, that *upon definite location* title to "*place*" lands passes *in præsenti by relation* as of the date of the grant, to say that, where, under the clearly implied provisions of the grant, there ceases to be any right to locate, the float, even as to place lands, ceases to be in the grantee?

Reading the act as a whole, was not the authority to "lay out and locate," *created and given solely by the act*, clearly and *solely* intended to be authority to locate *prior* to the time when the act said an even previously duly located tract should be totally lost and forfeited?

Must not we read the act and contract as a whole (*Northern Pac.* v. *Musser-Sauntry Co.*, 168 U. S., 604) and favorably to the grantor, and does not section 8 expressly explain and limit each and every power given by the act?

Must not a man's general words, and still more a legislature's, authorizing a thing to be done be restrained and confined from including what the whole instrument shows would be something contradictory and absurd?

This point, No. 5, seems to have been overlooked by the lower court, which wholly misapprehends the rele-

vancy of section 8, namely, to throw light on and limit the meaning of the words of the *granting sections*.

Was not the declaration of the supreme law that all *right* to keep lands already gotten and to get lands or titles or rights should be forfeited a prohibition to the officers of the Land Department to do anything inconsistent therewith? (The *Peggy*, 1 Cranch, p. 103.)

Were things intended by the general words used to be authorized to be given to the company after its right to get them was intended to be at an end?

Were locations intended, by general words used, to be authorized to be approved where the authority to make them was intended to have previously ceased?

Were constructions of road?

Were rights intended to be acquired in 1882 which were also intended to be lost in 1880?

Is there any such conception under these railroad grant laws as a float no longer being a right to locate lands?

We submit that there is no such thing even as to "place" lands (the land involved in this suit being claimed as indemnity land), and that no such useless conception is suggested by the decisions of this court above referred to.

When, therefore, the time for locating this road expired the title to lands east of Superior City was in the United States, wholly unaffected by any rights of the Northern Pacific Company already acquired, and those lands were incapable of being transferred to the company under the act of 1864, except (if at all) mistakenly and improperly.

It does not diminish the force of this point No. 4 to remember that under the Guilford-Miller ruling (7 L. D.,

100; 10 L. D., 288, 440; 19 L. D., 87) the Northern Pacific Company's right to select indemnity land was not any better than a homesteader's or preemptor's right to get the same lands, less than other companies' right to select which is a mere contingent privilege at most. (*Wiscon. Cent. R. R. Co.* v. *Price*, 133 U. S., 496; *R. R. Co.* v. *R. R. Co.*, 112 U. S., 421.)

V.

If we did not in our bill point out a forfeiture as part of our proof that our land had been mistakenly patented, and so ought not to be retained by the defendants, the defendants made it part of their defense that the road was constructed "duly" and "in all respects" in accordance with the law and the acts and resolutions amending it, and that so they not only got the land because the grant did extend to it, but are entitled to retain the land because the terms of the grant were duly complied with, which our replication denied. The defendants can not say that that question is not in the case.

Let us now suppose that we are wholly wrong in points Nos. 1 to 4, inclusive, and that title to the place and indemnity grant east to Ashland vested, and could only be disturbed by a reentry or its equivalent.

The answer not only denies that the Land Office was led into error in the way alleged—that is, by erroneously believing that the land was within the eastern boundary of the grant, whereas the grant ended at Duluth, but alleges that that boundary was through Ashland; that the land was not patented in consequence of a mistake, but

rightly, and furthermore, that the company constructed its road duly and in all respects as required by the granting act. It was wholly new matter to assert that the terminus was at Ashland and the road duly completed to Ashland. Of course, if the terminus was there, it was nowhere else, and so was not west of the land in question; but it might be as far east as the land in question and yet far west of Ashland. The replication denies all this, and the proofs have been in accordance with these pleadings. But the court of appeals says that we can not have a decree in accordance with the pleadings and proofs. We began by alleging that the grant did not reach to the land, and (at least for our benefit) all pleading and proof as to any other question are to be regarded as out of the case. The company seems to have borrowed all this defense from case No. 408, which it doubtless felt confident of winning, and in which it may have had hopes of obtaining favorable rulings on these points.

We denied and deny that road built after 1880 from Superior to the land in question was "duly" constructed. (*Northern Pac.* v. *Musser-Sauntry Co.*, 168 U. S., 610.)

We are aware that it has been supposed that officials of the Land Department could go on patenting after an ordinary forfeiture of a grant located in due time and proper place (our sweeping and emphatic section 8 is more than an ordinary provision for forfeiture), for the reason that these officials were supposed to have nothing to do with enforcing such forfeiture by entry or suit.

That conclusion does not seem to follow in logic or practical sense from that premise, however. There

seems to be a middle ground, especially so far as indemnity lands are concerned, between recovering the lands forfeited and giving out patents. The Attorney-General rather than the Land Department does the former, but it would seem to be the duty of the Land Department to advise him of the facts and suggest a suit, and in the meantime no official would seem to have a right to do anything on the assumption that there was no forfeiture.

A misunderstood *dictum* in *Schulenberg* v. *Harriman* seems to be at the bottom of this strange notion.

The court of appeals, far from thinking the Land Department has nothing to do with the forfeiture, and so to be at liberty to issue titles notwithstanding its existence, takes the *opposite* view, that it is authorized to waive it. No official, we submit, however, not even the Attorney-General, who can enforce it, could waive it. Only the authority that could make the grant could thus modify it.

This court is now made aware, by the pleadings and proofs which the defendants insisted upon putting into the case, that when this patent issued there was an unwaived forfeiture of "*each* and *every* grant, right, and privilege," including the right (if it existed) to have this tract of lieu land certified.

We insist that if there is no other reason for holding that we should have what we ask for in our bill—a reconveyance—the defendants are in no position to complain should the court hold this forfeiture to be a reason that is sufficient so far as the pleadings are concerned.

Certainly, the fact that we are asking a finding only as to the right to keep one tract of lieu land and have manifested no intention of asking a forfeiture of all land and

rights and privileges whatsoever all the way from Ashland to Puget Sound, is no reason why we should be denied what we do ask for.

The rule requiring the complainant to indicate in his bill the proof intended to be offered to show that there should be a recovery in such a suit as this, is based on the idea of warning the defendant, so that he can prepare to disprove that a mistake was made. It can not require this forfeiture to have been mentioned in the bill, since it is the defendants themselves who, not content with denying that the grant did not reach as far east as the land in dispute, whether because of deduction of grant as far east as this land goes, or want of authority to begin the road so far east, or expiration of time, have brought in the proposition and evidence to prove that the land should not be recovered because of full compliance opposite the land with the granting act, confirmed by acceptances, approvals, etc.

If the case, however, is to be reduced to the *particulars* in proof of mistake as they are stated in our bill, then we wish the benefit of eliminating two-thirds of the answer and of the proofs in support of it, including divers matters which the court of appeals makes use of against us, as impertinent, incompetent, irrelevant, and immaterial.

The court of appeals had no right to say, as in effect it does, that the construction of the road in accordance with law was in issue for the benefit of the defendants, but was not in issue for the benefit of the Government. The court happened to think there had been such com-

pliance, because of the Schulenberg dictum, and it proceeds to deduce from that compliance the conclusion that we should not now recover, even though a mistake was made, and then says that we should not recover for the additional reason that *non*compliance is not in issue.

This is and was a *direct* suit by the grantor against the grantee to cancel a patent his agent had issued under a limited and conditional granting act. The defendants knew that and deemed it wise to show that they *still had* a right to the land they claimed to have gotten by reason of the grant's going eastward so as to embrace it, that is to say, that the forfeiture mentioned in the grant had not occurred and given the grantor a right to recover. That was natural, the grant in question being necessarily in the case to be construed by the court and being on its face conditional. Upon all this, the grantor, also knowing his own character in relation to the land, joined issue.

It would now be late for the defendants to say, we desire our allegations and proofs not bearing upon the proposition that the grant stopped west of the land to be stricken out of the case or ignored, now that the grantor is thereby shown to have been and to be entitled to have the land back, because the Schulenberg dictum in a case not involving a direct attack by the grantor against the grantee turns out to be a broken reed.

VI.

If the Northern Pacific Company could go to Ashland, or a point on the lake farther east, what would have been

its grant between Superior City and Ashland was deducted by the granting act; because between those places its road is upon the same general line as that part of the Portage, Winnebago and Superior Company, lying between Superior (City) and Bayfield.

What Congress meant by a road upon the same general line is clear from the general scheme contemplated by the act of 1864—that is, a road connecting the waters of Lake Superior and those of Puget Sound. Another road which could, if the companies interested so desired, form a section of a direct and practicable road between Puget Sound and Lake Superior as authorized by that act, would not fail to be on the same "general line" because the companies did not see it to their advantage to make it such a section or locate both roads on one *identical* route.

The object evidently was to avoid doubling the grant of public land in order to get a section of road which there was no advantage to the general scheme in duplicating. This object could not be accomplished if the companies were to be at liberty to locate and construct two roads *paralleling* each other at a small distance apart and then say that they were not on the same general line because they were on two routes instead of an identical one.

It is submitted, therefore, that, regarding the Northern Pacific line as a whole and as reaching from Puget Sound to a lake terminus at Ashland, a road through Superior to a lake point *near* and north of Ashland would be upon the same general line for the distance between Superior and Ashland. It was not necessary that both

should go precisely to Ashland or both to Bayfield, if both went to the *lake*—the real objective—at neighboring points.

The Northern Pacific could go to the water transportation of the lake (its eastern objective) at Bayfield, and could not, by avoiding that particular point on the lake, prevent the other road to Bayfield from being on the same general line.

The scheme would gain nothing by having one of these roads reach the lake transportation at Bayfield and the other at Ashland, and yet the public is to lose an immense area of public land because of that fact, after taking precautions to avoid just such a loss. It did not want to have, at a great cost to itself, entirely out of proportion to the distance between them, *two* points, least of all two neighboring points, on Lake Superior connected with Puget Sound.

Looked at transcontinentally, the distance between Bayfield and Ashland is very small, and the roads both go through Superior. The general line of each the court knows judicially and from the record and maps on file, and we insist that they are, within the purpose and reasonable construction of the act of 1864, on "the same general line."

The "amount of land heretofore granted" was to be deducted from the "amount granted by this act." This is obviously a question of place limit lands only, for the place limit lands are *the amount* granted, the indemnity limits being merely to make compensation for deficiencies in that amount. The two grants were of the same amounts—ten sections per mile.

The court below, as though impatiently pushing aside a last obstacle to the development of its theory of the case, says: "Upon examination of the record, however, we find it impossible to determine from the facts before us what the effect of these contentions, if sustained, would be. * * * The case has not been tried with any reference to their consideration."

And yet halfway from Superior to Ashland or Bayfield—that is, to the Brulé River—if not all the way, and to a point far east, therefore, of the tract of land in question, the two grants are practically upon the same identical line, as a glance at the maps will show. From the river to Ashland and Bayfield there are two lines, but no farther apart than direct straight lines from a common point at the river to the two termini, at Bayfield and Ashland, would be.

VII.

When a statutory grant contains on the face of the law a provision that each and every grant, right, and privilege are upon condition that the road shall be completed within a certain time, and that time expires without performance of the condition, all future proceedings of executive officers in disregard of the forfeiture are unauthorized, ultra vires, and forbidden.

The proofs clearly disclose that the condition of the grant was not complied with. We may say that the fact is boldly admitted, but that vested land titles, for feudal reasons, are said to be in no way affected thereby, and that therefore we can not recover.

In one of the latest cases before it, and a very im-

portant one (*Atlantic and Pacific R. R. Co.* v. *Mingus*, 165 U. S., 412), this court, evidently with some misgivings as to the original correctness of one of its prior holdings, remarks:

> But, while we think the practice of forfeiting by legislative act is too well settled to be now disturbed, we do not wish to be understood as saying that this power may be arbitrarily exercised. * * * The inquiry in each case is a judicial one, whether there has been, upon either side, a failure to perform, and it makes but little practical difference whether such inquiry precedes or follows the reentry or act of forfeiture. * * * So far as the road was built and accepted by the Government after that time, it (the company) was *probably* entitled to receive its appropriate land grant, *but this was rather a matter of favor* than of strict *right*. * * * The company was not in a position to demand of the Government a strict and literal performance of its obligations when it had so completely failed to meet its own.

The court wishes to be understood as having said that the forfeiture law is to be regarded not so much as a law as a mere actual going upon the land with intent to reenter, which the Government, like an individual, may mistakenly and ineffectively do, when no forfeiture has in fact occurred.

Now, we submit that while such a "favor" may be conferred by the Government, no one is authorized by this granting act to do more than carry out the act, which certainly contemplates nothing to be or be done under certain circumstances mentioned in it but the creation and enforcement of forfeiture.

Is there any general power given to the Land Office to repeal acts of Congress creating forfeitures upon the coming into existence of certain facts? If not, what officer had a right to do more than enforce the forfeiture? If any had, under what law did he get it?

How does the command of the supreme law of the land that there shall be a forfeiture become one which public officials charged with the carrying out of that law are not bound to respect? If one gives his agent conditional instructions, is he to ignore the conditions because he is not twice instructed to respect them?

We repeat, if the Government can, as a "favor" and not a right, treat the forfeiture as not having happened, or waive it, with the effect of making a further disposition of public lands, no executive officer, from the President down, is the Government for that purpose. The Constitution expressly vests the power in Congress— not to be even delegated—to dispose of the lands of the United States.

It is just and necessary (and a court of equity can not regard it as inequitable, as the court below seems to do) that everyone should be held to know the law and everyone dealing with a public officer to know the limits of the authority which the law intrusts to him, no officer, as this court held in the "Arlington Case," having any power above or beyond that which the law gives him.

The court of appeals boldly takes the view that the land department could waive the forfeiture, and in that connection confuses two quite inconsistent things—waiving rights recognized as existing and "adjudicating" that they do not exist.

VIII.

The Congress authorized the company to file a map of definite location and did not, by any law relating to homesteads, preemptions, railroad grants or by any other disposition of public land, or law relating to the care and business of the public lands, make the effectiveness of such locating, in the matter of an eastern beginning point or any other point, or of the passing of titles to place lands or right of way, or to lien lands, or in the matter of anything else, dependent upon anything but the conformity or nonconformity of the locating with the granting act itself.

The court of appeals seems to think that the company could file a map strictly in conformity with the authority conferred to lay out and locate a road, and wholly unobjectionable under a proper construction of the statute, and that it would be mere waste paper if the Land Department did not vitalize it by its approval. Hence there could be no eastern terminus established without that Department's distinct, conscious, deliberate consent.

We do not so interpret the granting act or any statute giving general or special duties to the Land Department, if any other is to be found having to do with the question the matters here in controversy having been in fact carried on always and wholly by way of executing the granting act as the sole disposition by Congress of the lands and rights claimed by the railroad company.

The court also seeks to defeat us on the ground that the Land Department had "jurisdiction" of this whole matter of an eastern terminus and to patent lands, and that it makes no difference whether it mistakenly patented

our land to one not entitled to it or consented to the establishment of the wrong terminus or not.

If there is any law whose meaning is that the Land Department shall have jurisdiction to adjudicate, whether to patent any and all public lands to any and all applicants, and decide all questions any of them may choose to raise, we are not aware of it. If Congress has transferred to executive officers its own and its successor's power to dispose of the public lands, we had not learned that. That the Land Office is charged with the business of patenting most lands Congress has by statute seen fit to dispose of, and such other "public business relating to the pubic lands" as the executive branch is charged with, is doubtless true; but we submit that there is no law under which this land could have been patented to this railroad company, or under which the administrative "tribunal" of the Land Office was given any jurisdiction to decide whether or not to patent it to this railroad company, except the granting act, as amended by the joint resolution of 1870, and that it did in fact proceed under that and no other when it certified and patented this as indemnity land.

The lower court's favorite doctrine, repeated here from what it said in the Winona and St. Peter cases, met there with no confirmation by this court, which confined itself to eliminating, in view of a long-continued executive construction, want of constructive notice of what was held in the Dunmeyer case to be a defect of title from the definition of a bona fide purchaser.

The lower court fails to note that the special tribunal is entitled to more respect when deciding what Congress

intended it should decide than when mistakenly deciding what Congress intended to decide itself, and did decide itself, intending no one else to do more than intelligently respect its decision.

The Land Office was constituted by the granting act a special "tribunal" under section 3 to determine whether or not, among the place lands *which the act granted*, certain tracts were, upon the definite location *authorized to be made within so many years*, found occupied by homestead claimants, etc.; and if so, to consider and decide whether the tract selected, it being by survey or mathematical demonstration not more than so many miles from the line of the road as so located, was free public land.

But we deny that Congress authorized that Office to consider and decide as such tribunal; and, on the contrary, assert that Congress itself decided, before it passed the act, that the grant should lie between the westernmost shipping point in Minnesota, or that in Wisconsin, and Puget Sound, or, on the other hand, might reach to the Montreal River, at the option of the company, and impliedly forbade any patenting in disregard of such its intent.

Congress not being aware that it was making a grant which had other than a certain meaning, or one which could be easily rendered certain, was not intending to create a tribunal to explain, and alter by explaining, what it was itself explaining.

The grant meant the one thing or the other, *just as though Duluth or the Montreal River had been expressly* spoken of in it; and if, as we contend, it meant the

former, as though Duluth had been expressly declared the terminus, or it had said expressly that the westernmost practicable shipping point on Lake Superior should be the terminus, then the Land Department had no more jurisdiction under section 3 to decide any question relating to lands east of Duluth or Superior (since both are now and were in 1895 to be judicially noticed as shipping points) than it had to decide whether to patent to the company lands in Texas. It being of public notoriety, and so judicially known to any court or quasi-tribunal sitting in Minnesota or Wisconsin, or hearing appeals therefrom, that this land was far east of a shipping point on Lake Superior in Wisconsin and another in Minnesota, the facts upon which in 1895 the jurisdiction intended to be given by section 3 had to arise and stand manifestly could not exist.

To this is to be added that it was well known to the land officers and the company in 1895, and notorious, that the time for expiring and for forfeiting all rights had arrived without any *definite location* east of Duluth. Without a definite location it was impossible to become entitled to lands under section 3, or to ascertain the indemnity limits, and as there could no longer be a definite location, the time had run out for jurisdiction to be exercised under section 3, if it ever could have been, so far as this land east of Duluth was to be the subject-matter of it.

Both geographically and chronologically jurisdiction under section 3, and the subject-matter thereof, failed to extend to this patenting.

And yet the supposed jurisdiction is the whole basis of the opinion of the lower court, without which it must

fall like a house of cards. It is to be noted in that connection that decisions of what the court undiscriminatingly classifies as questions of fact, even if they were so, would no more be entitled to favorable presumptions than erroneous decisions of law, if the questions of fact were *not intended by Congress to be submitted for adjudication* to the so-called tribunal.

But it may be said that there was jurisdiction to inquire whether or not there was jurisdiction, and *pro hac vice* to inquire into those questions upon which its existence or nonexistence would depend, e. g., whether or not the grant was intended to be extensible beyond this land, and whether or not after 1880 it had lost its extensible quality, and whether, if not, it had been legally located to this land. But this is not the "*pro hac vice*" question. It may also be said that *power* to *patent* much free public land being in the Secretary under some one of the various laws making disposal of public lands, in the case of a patent not showing under which it was issued, the public would have a right to assume that the patent was issued under some one of those authorizations to the Government's patenting agent, and can not be expected to make an inquiry where there would be nothing to suggest a doubt. But if this is so, obviously it does not affect our present inquiry. No such assumptions, no purchaser's rights, can control this case. Neither should we fall into the error of reasoning in a circle, so as to prove that the Land Office can patent the Capitol grounds because it has jurisdiction to inquire and decide whether they are public lands which it can patent or not.

There is a line which common sense draws about the

jurisdiction of every tribunal, and there it is rightly regarded as the intent of the lawmaker that the jurisdiction shall cease.

The court is therefore confused and confusing when it says:

> This is a suit in equity brought by the Government itself to set aside the solemn judgment and conveyance of the quasi-judicial tribunal to which it intrusted the power and on which it imposed the duty to hear and determine the very questions whether or not the corporation was entitled to do these acts and thereby earn these lands, notwithstanding the fact that the time fixed for their performance had passed.

It overlooked, among other things, *Burfenning* v. *Chicago, St. P., etc., Ry. Co.*, 163 U. S., 321. See also 7 L. Dec., 114; *Buttz* v. *North. Pac.*, 119 U. S., 73.

We submit, further, that neither any general law nor the granting act authorized the land department to control (actually or relatively to this case) the legal effect of a map of definite location or of a selection of an eastern terminus by map, construction or assignment, etc., by accepting or rejecting or deciding upon the same.

Filing was something the company was authorized to do, and its rights were to arise by operation of law the moment it filed a map or did the other things in conformity with law as to time, directness, termini, etc. The land officers could not take away those rights or prevent them from existing or *add one jot to the requirements the law imposed upon the company.*

It may be proper enough for the Secretary, without any statute authority to do so, to reject a map filed too

late or not otherwise conforming to the law, but this merely serves notice that *he* doubts the conformity of the map with the law and may refuse to do those things which *he* is given the task to do *after* the grant is lawfully located *by the company*, for example, exercise jurisdiction concerning lieu lands under section 3. But if it is, it is, and he can not alter the legal effect of the map filed. His refusal to accept it and to recognize that he has acquired jurisdiction under section 3 is simply another mistake. The map operates under the granting act in spite of him. It passes title *eo instanti* to lands and withdraws lands. By the stronger reason, if he undertakes to accept and act upon a map which is not in conformity with the statute, for example, filed too late or going to the wrong terminus, he is simply piling one mistake upon another. Title to place lands is not passed by his acceptance, and the *statute* does not, by reason of his opinion, withdraw lands.

Such mistakes do not rob either the company or the Government of its rights given and secured by the granting act and by that alone. They neither amend the law nor modify the contract, nor execute the contract.

So, in like manner, it may be proper for the President to refuse to appoint, under section 4, commissioners to examine the *mechanical construction* of road, if he thinks it is upon a wholly unauthorized line; for they are only to examine *said road*, the one authorized, and not other roads. But if it *is* upon the proper line, the company's right to confirmatory patents to lands under section 4 is not extinguished by such refusal, and so if the road,

not on an authorized line or constructed too late, is examined by the President's orders, that does not deprive the Government of its rights stipulated in the granting contract.

It is needless to add that we are presupposing that action is taken by President or Secretary as to matters arising before the time limit expires, and needless to remark that neither a map of definite location nor construction of road was to be passed upon by the land officers, even in this way, so far as the assigned road from Thomson to Duluth is concerned, and that, therefore, the question whether Duluth became the eastern terminus by or in consequence of consolidation or assignment, can not be affected by any supposed authority of the Secretary or President over locations and constructions.

For the question whether Duluth became the terminus can and should be distinguished from all others, and especially from the lately arisen question, never heard of until 1884, whether Ashland became the terminus.

If the company did what it was to do in establishing an eastern beginning by filing a map showing a line to Superior, and protracted a line beyond it, which would in law be surplusage, leaving the map to avail as far as it was good (*United States* v. *Southern Pacific R. R.*, 146 U. S., 591), or by constructing to Superior or going to Duluth by means of the Lake Superior and Mississippi, or otherwise, it is immaterial whether the Land Office (or the company, or both) thought then or later that the company could go on and touch the lake at a second shipping point. The terminus or "eastern initial point" was none the less established in the eye of the law on that

account, both absolutely and from the standpoint of this suit by the grantor against the grantee in which no third party's rights or special equities have intervened.

IX.

We have not deemed it necessary, in view of the fundamental errors herein pointed out, to lengthen this brief with a discussion of every question discussed below, but if this court views the various questions from the view point adopted by the lower court, then we reiterate the arguments shown by the court's opinion to have been made before it.

Some of the propositions upon which we are disposed to place much reliance do not seem to have been considered at all below, or, if at all, do not seem to have been looked at from the most desirable standpoints from which to judge of their force.

There are some theories, such as that of the superiority of an obtuse angle from the point at which the water of the lake stops the locating of our road, over a right angle so occasioned by the water of the Pacific, in the case of the Atlantic and Pacific road, which we do not care to argue at all.

Neither shall we discuss the question whether a vested wrong, if of great magnitude, several years old, and otherwise respectable, ought to have been disturbed by an Attorney-General, who was set in motion by a decision of Secretary Lamar, which he misunderstood, and by a belated "discovery" of another Secretary. It has been our notion that as Congress, by merely declaring that there should be an Attorney-General of the United

States, intended to borrow an office bodily from the British system of government. The office is one which involves large and responsible deciding authority in the matter of enforcing the Government's rights, and that what the court of appeals needed to inquire into, when the Attorney-General had decided to sue, was the proper way to adjudicate the case.

Since writing all of the foregoing we have received the brief of counsel for appellees filed in Nos. 121 and 408. It is a very good brief, and repeats the argument which has the merit of having convinced the lower court, viz, because things are as they are they ought to be left as they are. We had supposed, as already suggested, that the wisdom and propriety and abstract justice of canceling a patent in such a case as this was a matter submitted by law to the Attorney-General's decision and not to that of the court of appeals. The Attorney-General often listens to arguments against bringing suits of this kind, or in favor of dismissing them, and probably did so in the present instance.

For a court whose opinions guide, in unforeseeable cases, all the courts and lawyers in forty-odd States and some Territories, we do not think the argument referred to will suffice. An attorney in case No. 241 on your list for this term called our attention only yesterday to the fact, as he thinks, that our case will affect his clients and many others. Whether correctly or not, we have not examined the case carefully to see, but it seems to be supposed to involve the propriety of the ruling of the Secretary of the Interior in the famous matter of the *Northern Pacific Railroad Company* v. *Guilford Miller*

and the question whether or not a great quantity of lands west and east of Thomson, which have been given to homesteaders and preemptors, belong to the company as indemnity lands. They were withdrawn for the company as such in 1873, and in 1887 the withdrawal was held in the Guilford Miller ruling to be void *ab initio*. We mention this particular case because of what is said in the brief of the other side, at the bottom of page 18 and top of page 19, tending to show that your decision, if in favor of the company, would not give it a very great quantity of place and indemnity lands.

CHARLES W. RUSSELL,
Assistant Attorney.

NORTHERN PACIFIC RAILWAY COMPANY,

Defendant in Error.

No. 495.

UNITED STATES OF AMERICA,

Appellant,

vs.

NORTHERN PACIFIC RAILROAD COMPANY, NORTHERN PACIFIC RAILWAY COMPANY, and EDWIN H. McHENRY and FRANK G. BIGELOW, as receivers of the Northern Pacific Railroad Company,

Appellees.

ARGUMENT FOR DEFENDANT IN ERROR AND APPELLEES.

C. W. BUNN and
JAMES B. KERR,
Counsel for Defendant in Error and Appellees.

SUPREME COURT
OF THE UNITED STATES.

OCTOBER TERM, 1899.

No. 121.

ANDREW DOHERTY,
Plaintiff in Error.

vs.

NORTHERN PACIFIC RAILWAY COMPANY,
Defendant in Error.

No. 408.

UNITED STATES OF AMERICA,
Appellant,

vs.

NORTHERN PACIFIC RAILROAD COMPANY, NORTHERN PACIFIC RAILWAY COMPANY, and EDWIN H. MCHENRY and FRANK G. BIGELOW, as receivers of the Northern Pacific Railroad Company,
Appellees.

ARGUMENT FOR DEFENDANT IN ERROR AND APPELLEES.

STATEMENT.

The two cases above entitled depend upon substantially the same facts and involve the same

question. The court directed that they be heard, in argument, as one case. The same brief is, therefore, presented in both cases.

The Doherty case is before the court on a writ of error directed to the supreme court of Wisconsin. The opinion is printed in the transcript pp. 105-114, and reported in 100 Wis. p. 39. It involves the title of the defendant in error to a piece of its right of way between Superior and Ashland, Wisconsin.

The United States case is before the court on the appeal of the United States from a judgment of the circuit court of appeals for the eighth circuit affirming a judgment of the circuit court for the district of Minnesota dismissing a bill in equity filed by the United States to set aside a patent to the Northern Pacific Railroad Company, on the ground that the land conveyed by the patent was outside the limits of the Northern Pacific grant. The land involved lies in Minnesota and was patented by the United States to the company on account of its line between Superior and Ashland. The opinion of the circuit court is printed in the transcript pp. 161-166, and the opinion of the court of appeals is printed in the transcript pp. 161-166, and reported in 95 Fed. Rep. p. 864.

Both cases were heard upon agreed statements of fact and the question is presented: where is the eastern terminus of the Northern Pacific Railroad? It is contended by both Doherty and the United States that the terminus was fixed at Duluth, or if not at Duluth, then at Superior City, Wisconsin. It is contended by the defendant in error and ap-

pellees that the terminus was fixed at Ashland, Wisconsin. Reference will be made to the record in the Doherty case as "Case No. 121, transcipt p -----," and in the United States case as "Case No. 408, transcript p-----."

The facts upon which the question of the location of the terminus depends are as follows:

The Northern Pacific Railroad Company was created by act of congress approved July 2, 1864, entitled "An act granting lands to aid in the construction of a railroad and telegraph line from Lake Superior to Puget's Sound on the Pacific coast by the northern route." (13 *Stat. at Large*, 365.)

It is provided by the first section of this act as follows:

> "And said corporation is hereby authorized and empowered to lay out, locate, construct, furnish, maintain and enjoy a continuous railroad and telegraph line, with the appurtenances, namely, beginning at a point on Lake Superior, in the state of Minnesota or Wisconsin; thence westerly by the most eligible route as shall be determined by said company, within the territory of the United States, on a line north of the forty-fifth degree of latitude, to some point on Puget's Sound. * * *"

By section 3 of the act of July 2, 1864, lands were granted to aid in the construction of the proposed railroad to the amount of ten alternate sections per mile on each side of the line within the states, and twenty alternate sections in the territories, with a right of indemnity for lands excepted from the grant within ten miles of the limits of

such alternate sections. (Case No. 121, transcript p. 29; Case No. 408, transcript p. 114.)

By the joint resolution of congress of May 31, 1870, a further indemnity belt ten miles in width, on each side of the line, was created, from which the compny was entitled to satisfy losses occurring after the date of the grant which could not be satisfied within the first indemnity limits of the state or territory wherein they occurred. (Case No. 121, transcript p. 35; Case No. 408, transcript p. 118.)

The act required an acceptance of its terms and impositions by the company within two years from its approval, and this was given December 29, 1864. (Case No. 121, transcript p. 35; Case No. 408, transcript p. 118.)

Section 18 of the granting act required the company to obtain the consent of the legislatures of the several states through which the road should pass previous to commencing the construction thereof, and in the year 1865 the legislatures of Minnesota and Wisconsin gave such consent. (Case No. 121, transcript pp. 36-38; Case No. 408, transcript pp. 118-123.)

In 1870, the company located the general route of its railroad from the mouth of the Montreal River, in Wisconsin, a point about thirty miles east of Ashland, across the states of Wisconsin and Minnesota, to a point on the Red River of the North, near Fargo, on the boundary between Minnesota and the then territory of Dakota. A map showing this location of the general route was, on August 13, 1870, transmitted by the company to

the secretary of the interior. (Case No. 121, transcript p. 39; Case No. 408, pp. 123-4.)

Copies of this map are before the court marked "Exhibit 1," in case No. 121, and "Exhibit 4," in case No. 403.

Upon receipt of this map, and on August 13, 1870, the secretary transmitted it to the commissioner of the general land office, with instructions to withdraw from sale, homestead and pre-emption, all odd-numbered sections of land within twenty miles of the line so designated within the states of Wisconsin and Minnesota. (Case No. 121, transcript p. 39; Case No. 408, transcript p. 124.)

Thereupon, the commissioner of the general land office withdrew the odd sections within twenty miles of the line of general route in Wisconsin and increased in price to $2.50 per acre all even numbered sections of public land within those limits. (Case No. 121, transcript p. 40; Case No. 408, transcript p. 125.)

Thereafter, whenever cash payment was required by law in the disposition of any of said even-numbered sections, the district officers demanded payment therefor at the rate of $2.50 per acre, and the United States disposed of large quantities of land so situated, and received payment therefor at the rate of $2.50 per acre. (Case No. 121, transcript p. 40; Case No. 408, transcript p. 125.)

In the year 1882 the chief engineer of the Northern Pacific Railroad Company prepared a map showing the proposed line of the definite location of said railroad from a point on the St. Paul & Du-

luth Railroad (formerly the Lake Superior & Mississippi Railroad) in section one (1), twonship forty-eight (48), north of range seventeen (17), west of the fourth principal meridian, Minnesota (now known as Thomson Junction), easterly to a point in section fifteen (15), township forty-seven (47) north, of range two (2) west of the fourth principal meridian, Wisconsin, and, on May 9, 1882, the executive committee of the board of directors, duly authorized so to do, adopted the following resolution:

> "The chief engineer, having made and forwarded a map or plat of that part of the company's main line of railroad which extends from a point on said main line in section 1, of township 48 north, of range 17 west of the fourth principal meridian, in the state of Minnesota, to the crossing of Bad river to section 15 of township 47 north, range 2, west of said meridian, in the state of Wisconsin, duly verified by his affidavit on the 17th day of April, 1882, whereon is indicated by a red line the said definite location, and the same being carefully considered, it was, on motion of Mr. Harris:
>
> "Resolved, That the said map or plat be, and the same is hereby approved; and the line of the Northern Pacific Railroad as above described is hereby definitely fixed on, and according to the said red line indicated and laid down on said map. And the president of the company is requested to certify the said plat and cause it to be filed in the office of the commissioner of the general land office." (Case No. 121, transcript p. 41; Case No. 408, transcript p. 125-6.)

This map was, accordingly, duly certified by the officers of the company and verified by the chief

engineer, and transmitted by the president of the company to the secretary of the interior for filing in the office of the commissioner of the general land office. (Case No. 121, transcript p. 41-43; Case No. 408, transcript p. 127.)

Copies of this map are before the court marked "Exhibit 2" in case No. 121, and "Exhibit 6" in case No. 408.

This map of definite location was thereupon, and on July 6, 1882, duly transmitted to the commissioner of the general land office by the secretary of the interior, and thereafter, and on November 22, 1882, the secretary instructed the commissioner to adjust the grant to the Northern Pacific Railroad Company in accordance with the maps of definite location, including the map just mentioned, in so far as the railroad had been constructed. (Case No. 121, transcript pp. 43-44; Case No. 408, transcript pp. 128-129.)

Thereupon the commissioner of the general land office prepared a diagram showing twenty, thirty and forty mile limits on each side of said line of definite location, extending eastward from Thomson Junction as far as the road had then been constructed, a distance of twenty-five miles. These limits were respectively the limits of the lands in place, the indemnity belt created by the act of July 2, 1864, and the additional, or second, indemnity belt created by the joint resolution of May 31, 1870. This diagram the commissioner transmitted to the district land officers at Bayfield, Wisconsin, on January 5, 1883, together with a letter of in-

structions directing them to withhold from sale, pre-emption and homestead all the odd-numbered sections within the designated limits, and as before, upon the location of the general route, to hold all even-numbered sections within twenty miles of the line at a minimum price of $2.50 per acre. (Case No. 121, transcript pp. 44-45; Case No. 408, transcript pp. 129-130.)

On May 17, 1883, the secretary of the interior further instructed the commissioner to withdraw all odd-numbered sections of land within thirty miles of said line of definite location, without reference to the construction of the road, and the commissioner, on June 22, 1883, took action similar to that taken by him on January 5, 1883, and extended the withdrawal of lands within the thirty-mile limits the full length of said line of definite location. (Case No. 121, transcript pp. 45-46; Case No. 408, transcript pp. 131-132.)

On October 8, 1883, the secretary directed the commissioner to extend the withdrawal to the forty-mile or second indemnity limits, the full length of the definite location in Wisconsin, and in accordance with these instructions the commissioner so directed the local officers at Bayfield. (Case No. 121, transcript pp. 46-47; Case No. 408, transcript pp. 132-133.)

The board of directors of the Northern Pacific Railroad Company, on August 20, 1884, adopted the following resolution:

> "Resolved, That the eastern terminus, or point of beginning of the Northern Pacific Railroad on Lake Superior be and the same is

> hereby fixed, determined and established at a point at the city of Ashland, on Lake Superior, in the county of Ashland, in the state of Wisconsin, in section 27, township 48 north, of range 4 west of the fourth principal meridian."

A copy of this resolution, duly certified, was transmitted to the commissioner of the general land office on December 3, 1884. (Case No. 121, transcript p. 47; Case No. 408, transcript pp. 133-134.)

Thereafter, the commissioner of the general land office prepared a diagram showing the final eastern terminal of said line as fixed by the above resolution, and on February 3, 1887, transmitted the same to the district officers at Bayfield, Wisconsin, together with a letter of instructions, wherein he recites the filing of the maps of general route and definite location, and the fixing of the eastern terminal at Ashland, and directs the adjustment of the grant on the basis of the location and terminal so fixed. (Case No. 121, transcript pp. 48-49; Case No. 408, transcript pp. 134-135.)

Copies of this diagram are before the court marked "Exhibit 3" in case No. 121, and "Exhibit 7" in case No. 408.

The point at Ashland so fixed as the terminus is substantially on the line of definite location as defined by the map of July 6, 1882, but about twelve miles west of the most easterly point shown on that map. A spur of about a mile in length leaves this line at a point in the city of Ashland, and by this means actual contact with the waters of Lake Superior is effected.

The road was constructed eastward from Thomson Junction to Ashland, and westward from Thomson to a point fifty-five miles west of Helena, Montana, and was constructed eastward from Wallula Junction, in the territory of Washington, a point east of the Cascade Mountains, to said point fifty-five miles west of Helena, and these portions of the line were united at the last mentioned point in August, 1883. During the years 1885, 1886 and 1887 the company constructed its road from a point on the line about sixteen miles north of Wallula Junction over the Cascade Mountains to Tacoma, on Puget's Sound. (Case No. 121, transcript p. 49; Case No. 408, transcript pp. 135-136.)

The portion of the road extending eastward from Thomson Junction to Ashland was constructed on the line of definite location, as shown by the map of 1882, in the years 1881, 1882, 1883 and 1884, and was examined in three sections by commissioners appointed by the president of the United States, as provided by section 4 of the act of July 2, 1864. (Case No. 121, transcript p. 50; Case No. 408, transcript p. 136.)

The first of these three sections extended from Thomson Junction to Bluff Creek, a point within the corporate limits of Superior City, a distance of twenty-five miles, and was constructed in 1881 and 1882. The commissioners appointed to examine the same duly reported that this section was constructed in compliance with the act of congress of July 2, 1864, and this report was transmitted to the president by the secretary of the interior, with

a recommendation that the report be accepted and that patents be issued for lands earned by its construction. These recommendations were approved by President Arthur, Sept. 16, 1882. (Case No. 121, transcript pp. 50-51; Case No. 408, transcript pp. 137-138.)

The second section of twenty-five miles of road, extending from Bluff Creek to the Brule River, was constructed in the latter part of the year 1883. This section was in like manner examined by commissioners, reported favorably, its acceptance recommended by the secretary, and the report approved by the president, January 31, 1884. (Case No. 121, transcript pp. 51-52; Case No. 408, transcript pp. 138-139.)

The third section, extending from the Brule river to Ashland, a distance of thirty-seven and one-half miles, was constructed in 1884, and was duly examined by commissioners, who reported in favor of its acceptance. This report, on the recommendation of the secretary of the interior, was approved by the president February 6, 1885. (Case No. 121, transcript pp. 52-53; Case No. 408, transcript pp. 139-140).

As part of the case of Doherty and of the United States, the following facts are stipulated:

That the map or plat marked "Exhibit A" in case No. 121, and "Exhibit I" in Case No. 408, is a true and correct copy of a certain map or plat now in the office of the commissioner of the general land office, which said map or plat was transmitted by Josiah Perham, president of the Northern Pacific

Railroad Company, to the secretary of the interior on March 6, 1865, together with a letter in which it was stated that the map or plat showed the general line of the Northern Pacific Railroad from a point on Lake Superior, *in the State of Wisconsin,* to a point on Puget Sound. (Case No. 121, transcript p. 53; Case No. 408, transcript p. 103).

This map shows upon its face, as indicated on the copy, two lines; one starting at the mouth of the Montreal river in Wisconsin and extending over and across the states of Wisconsin and Minnesota and traversing a portion of the territory of Dakota; the other line, commencing at or near Duluth, and extending across the state of Minnesota to a point in the territory of Dakota, where the two lines converge, and thence a single line extending to Puget Sound. The line starting at the mouth of the Montreal river is erased by a wavy line drawn over it.

Upon receipt of this map, the secretary of the interior transmitted the same, together with the letter of President Perham, to the commissioner of the general land office, and in a communication addresssed to that officer, suggested a withdrawal of the lands along the line indicated on the map in Minnesota and *Wisconsin.* (Case No. 121, transcript p. 54; Case No. 408, transcript pp. 104-105).

Upon the receipt by the commissioner of the general land office of this map, he addressed a communication to the secretary of the interior, in which he recommended that the map be rejected for the reason that it did not comply with the rules of

the land department. (Case No. 121, transcript p. 101; Case No. 408, transcript pp. 105-107).

In the Doherty case it is stipulated that the secretary of the interior approved the recommendation of the commissioner by endorsement on his letter (transcript p. 101), but in the United States case it is stipulated that there is endorsed on the letter of the commissioner the words "Sec'y sustains comm's refusal," (transcript p. 108) and that except as above stated, the department of the interior has never taken any action under or relative to said map, or made any withdrawal of lands thereunder. (Case No. 408, transcript p. 109).

The minutes of the board of directors of the Northern Pacific Railroad Company from December 7, 1864, the date of the first meeting of said board, up to the 18th day of May, 1865, show no action by said board with reference to locating the line of the Northern Pacific Railroad, and said minutes do not show any action conferring special authority upon the president of the company to locate said line. (Case No. 121, transcript p. 100; Case No. 408, transcript p. 108).

The powers of the president as conferred by the by-laws, are set out and are confined to presiding at meetings of the board of directors and exercising a general supervision over the affairs of the company. (Case No. 121, transcript p. 100; Case No. 408, transcript pp. 109-110).

By an act approved May 5, 1864, entitled "An Act making a grant of lands to the state of Minnesota to aid in the construction of the railroad from

St. Paul to Lake Superior," congress made a grant of ten sections of land per mile to aid in the construction of the road named in the title. This grant was duly conferred by legislation of the state of Minnesota upon the Lake Superior & Mississippi Railroad Company, a corporation created under the laws of that state, afterward known as the St. Paul & Duluth Railroad Company. (Case No. 121, transcript pp. 55-57; Case No. 408, transcript pp. 102-103).

By an agreement entered into on the 9th day of July, A. D. 1870, between the Northern Pacific Railroad Company, the Lake Superior & Mississippi Railroad Company, the Western Land Association and the Lake Superior & Puget Sound Company, it was agreed that the Northern Pacific Railroad Company should so connect its road with that of the Lake Superior & Mississippi Company at or near the Dalles of the St. Louis river as to open direct communication by rail with the town of Duluth, and should enter into running arrangements with the Lake Superior & Mississippi Railroad Company on terms that should be just and equitable to accomplish that object, and that the Northern Pacific Railroad Company should make its first connection east from the point of intersection with the Lake Superior & Mississippi Railroad Company by way of the line of the said last mentioned company over Rice's or Minnesota Point, and that it would not build any other road so as to form a connection running eastward of the Lake Superior & Mississippi Railroad north of Wyoming previous

to the completion of its road to the Missouri river. (Case No. 408, transcript pp. 11-16).

This agreement does not appear in the Doherty case.

On November 21, 1871, the Northern Pacific Railroad Company filed a map of definite location of that portion of its road extending from Thomson Junction in the state of Minnesota, westward a distance of two hundred and twenty-eight and two-tenths miles, to Fargo, on the Red River of the North, on the eastern boundary of the territory of Dakota. (Case No. 408, transcript p. 110).

The letters of transmittal from the railroad company to the secretary of the interior, and from the secretary of the interior to the commissioner of the general land office, which were filed with this map, and the map itself, show that the eastern point indicated thereon is Thomson Junction and not Duluth, as was intimated in the brief of the government in the court of appeals. (Case No. 408, transcript pp. 157-158). The map is "Exhibit 2" in case No. 408, but does not appear in the Doherty case.

On January 1, 1872, the Lake Superior & Mississippi Railroad Company had constructed and was operating a railroad from St. Paul to Duluth by way of the village of Thomson, and on that day the Northern Pacific Railroad company purchased a half interest in that portion of the road extending from Thomson to Duluth, a distance of twenty-six miles, for a consideration of five hundred thousand dollars. (Case No. 121, transcript pp. 58-63; Case No. 408, transcript p. 111, pp. 17-24).

On the same day, January 1, 1872, the two companies entered into an agreement in writing for the operation of the portion of the road in which the Northern Pacific Company had acquired a half interest. (Case No. 121, transcript pp. 64-70; Case No. 408, transcript p. 111, pp. 25-33). This agreement has to do with the operating of trains and the maintainance of the road. It provides for a schedule of trains and for rules and regulations for the running of trains, to be agreed upon between the superintendents of the two companies.

On May 1, 1872, the Northern Pacific Company and the Lake Superior & Mississippi Company entered into a further agreement, by the terms of which the Lake Superior & Mississippi Company leased to the Northern Pacific its line extending from St. Paul to Duluth, and assigned to the last named company its interest under three certain leases executed to it by the Stillwater and St. Paul, the Minneapolis & Duluth and Minneapolis and St. Louis Railroad Companies, of their respective lines of railroad then under construction. By the terms of the agreement the Northern Pacific Company agreed to pay as annual rental for the lines of road a sum equal to thirty per centum of the gross earnings thereof, except that portion from Thomson to Duluth where the Northern Pacific was allowed the benefit of its half ownership. The land grant of the Lake Superior & Mississippi Company is expressly excepted from the operation of the lease. (Case No. 121, transcript pp. 71-89; Case No. 408, transcript p. 111, pp. 34-57).

On the 21st day of April, 1874, the Northern Pacific Railroad Company surrendered all rights conferred by the lease of May 1, 1872, by executing a formal relinquishment of all its interest under the lease and assignments. (Case No. 121, transcript pp. 89-97; Case No. 408, transcript pp. 141-149).

The Northern Pacific Railroad Company operated the line of railroad extending from Thomson Junction to Duluth, a distance of about twenty-six miles, in which the Northern Pacific Company acquired a half interest by deed of conveyance of January 1, 1872, for a period of about fourteen years, to-wit, from the first day of January, 1872, to about the first day of January, 1886. The line was then abandoned by the Northern Pacific Company, and has since been unused. (Case No. 408, transcript p. 149).

In the United States case it further appears that in the month of February, 1873, the directors of the Northern Pacific Railroad Company were informed that claim was made by the officers of the Lake Superior & Mississippi Railroad Company that the effect of that certain deed of conveyance of January 1, 1872, whereby the Lake Superior & Mississippi Company conveyed to the Northern Pacific Company a half interest in that portion of its road extending from Thomson Junction to Duluth, was to fix the eastern terminus of the Northern Pacific Railroad at Duluth, and thereupon by resolution duly adopted on the 13th day of February, 1873, the directors of the Northern Pacific Company called upon the Lake Superior & Mississippi Company for

an agreement construing the agreement of January 1, 1872, so that the same should not be held to intend or have intended to fix the eastern terminus of the Northern Pacific Railroad at Duluth; and thereafter and on the 2nd day of June, 1873, the Lake Superior & Mississippi Railroad Company, by resolution of its board of directors, duly adopted, agreed with the Northern Pacific Railroad Company that said agreement of January 1, 1872, should not be held to intend or have intended that the eastern terminus of the Northern Pacific Railroad should be, or was, by virtue of said agreement of January 1, 1872, established at Duluth. (Case No. 408, transcript pp. 140-141).

The record in this case also shows that the Northern Pacific Railroad Company has never claimed to be entitled to receive any lands from the United States on account of said line of railroad extending from Thomson Junction to Duluth, and it has never received any lands whatsoever on account of that line. (Case No. 408, transcript p. 149).

It has been claimed by the government that the title to more than a million acres of land will be determined by this suit. It appears, however, that there are within the place limits of the grant east of Thomson Junction, only eight sections or 5,120 acres of land, which are subject to the grant; and in the indemnity limits, only 52,546 acres. (Case No. 408, transcript p. 152.)

It is true that if the lands were to be found within the indemnity limits west of Thomson

Junction, the company would be entitled to select a large quantity in lieu of the losses from the place limits between Thomson and Ashland, but there is an ascertained deficiency in the indemnity limits, which will render it impossible for the company to satisfy any portion of these losses. See certificate of the commissioner of the general land office, reported to the senate, and printed as Senate Document 150, Vol. 5 of Senate Documents, 54th Congress, second session.

The facts peculiar to the Doherty case are as follows:

The proceeding was instituted by the filing of a petition by Doherty in the superior court for Douglas county, Wisconsin, in which he alleged that he was the owner of the north half of the southwest quarter (N½ S W ¼) of section four (4), township forty-seven (47), north, of range eleven (11) west, situated in Douglas county, and that the Northern Pacific Railroad Company had entered upon and constructed its road over and across said premises without authority. It was further alleged that the Northern Pacific Railway Company had succeeded to the rights of the Northern Pacific Railroad Company, and was operating the road so constructed. The petition prayed that Doherty be adjudged the owner of the land so appropriated and that commissioners be appointed under the Wisconsin statute to assess the damages of the petitioner.

To this peition the Northern Pacific Railway Company interposed an answer asserting title by

virtue of the grant of right of way by Section 2 of the act of congress of July 2, 1864, to the Northern Pacific Railroad Company and a purchase of the interest of the last named company.

It appeared that on November 8, 1882, Doherty made homestead entry of the land in question and thereafter made the proof required by law of five years' residence and cultivation, and on February 6, 1890, a patent was issued to him for the land covered by his entry. (Case No. 121, transcript pp. 24-25).

The land was public land on July 2, 1864, and in December, 1883, the Northern Pacific Railroad Company constructed its road across the land and continued to occupy it for railroad purposes until August 31, 1896, when the Northern Pacific Railway Company succeeded by purchase to its rights and has since operated the road. (Case No. 121, transcript p. 25).

The land lies east of Superior City and the portion occupied for railroad purposes is on the line of definits location as shown by the map filed July 6, 1882. (Case No. 121, transcript p. 50).

It is conceded that if the eastern terminus of the road was lawfully fixed at Ashland, the title of the company under its grant of right of way relates back to July 2, 1864, under the decision of this court in Railroad Company vs. Baldwin, 103 U. S. 426, and Doherty's rights under his patent are subject to the earlier grant.

Both the circuit court of appeals and the supreme court of Wisconsin held that the terminus of the road was established at Ashland.

ARGUMENT.

It is clear that if it shall be held that the terminus or point of beginning of the Northern Pacific Railroad was lawfully fixed at Ashland, the judgments of the lower courts must be affirmed.

The claim that the eastern terminus was not established at Ashland is founded on two decisions of the secretary of the interior, overruling the long settled construction of the department upon the question.

The first of these decisions was rendered Nov. 13, 1895, and is reported in volume 21 of Land Decisions, at page 412. The second of these decisions was rendered Aug. 27, 1896, and is reported in volume 23 of Land Decisions, at page 204.

The first of these decisions was rendered by the secretary upon the consideration of a list of indemnity selections, filed by the Northern Pacific Railroad Company, based on losses of lands within the place limits lying east of Superior. The opinion reviews the action taken by the company for the purpose of locating its line, and finally concludes that because the company was empowered to locate and construct a line of railroad from a point on Lake Superior to some point on Puget Sound, it had authority to touch the lake at only one point, and although the company did all things in its power to establish its point of beginning at Ashland, and filed a single map of definite location from Thomson Junction to Ashland, the fact that the line so located and constructed touched the lake

at Superior precluded the company from extending its line eastward from that point. The decision holds that the power of the company was exhausted in this respect when its line once touched the lake. The secretary also strongly inclines in this opinion to the view that the Northern Pacific Company effected a consolidation, confederation and association with the Lake Superior and Mississippi Railroad Company by acquiring a half interest in that company's line from Thomson to Duluth, and thereby fixed its eastern terminus at Duluth. This question, however, was left open for future consideration.

By the decision of the secretary of Aug. 27, 1896, it was held that such a consolidation had been effected, and that Duluth must be considered the terminus of the road.

A preliminary question which was urged upon the court of appeals will be first considered and the two decisions by the secretary of the interior will be examined.

I.

Was the Power to Locate and Construct the Road Between Thomson Junction and Ashland Forfeited by Lapse of Time?

It is contended that the grant of lands to the Northern Pacific Railroad Company east of Thomson Junction lapsed and was absolutely forfeited

by reason of the fact that the portion of the line contemplated by the act, extending from Thomson Junction to Ashland, was not definitely located and constructed within the time specified by section 8 of the act of July 2, 1864, and the acts amendatory thereof.

It is understood that this claim of forfeiture of the land grant is made upon the theory that, when the time expired within which the road should have been completed, *ipso facto* the company forfeited all rights under the granting act, to locate and construct that portion of its line from Thomson to Ashland.

It is submitted that the fallacy of this argument is apparent upon an examination of the provisions of the act of July 2, 1864. By that act three separate and distinct grants were made.

First—The grant by which the persons named were created and erected into a body corporate and politic, and the incidents of perpetual succession, power to sue and be sued, and to have a common seal, were conferred.

Second—The grant of power to locate, construct and maintain a railroad between the termini mentioned.

Third—The grant of lands and right of way to aid in the construction of the road.

By section 8 of this act it was provided:

> "That each and every grant, right and privilege herein are so made and given to, and ac-

> cepted by, said Northern Pacific Railroad Company, upon and subject to the following conditions, namely: That the said company shall commence work upon said road within two years from the approval of this act by the president, and shall complete not less than fifty miles per year after the second year, and shall construct, equip, furnish, and complete the whole road by the fourth day of July, *Anno Domini* eighteen hundred and seventy-six."

By legislation the time for completion of the road was extended to July 4, 1880, (14 Stat. 355; 15 Stat. 255).

This argument is understood to rest upon the proposition that inasmuch as the right of the company to lands east of Thomson depends upon the act of July 2, 1864, and inasmuch as no lands can fall within the terms of that act until identified by the location and earned by the construction of the road, if the company forfeited its right by lapse of time to locate and construct its road between Thomson and Ashland, the location and construction after July 4, 1880, were unauthorized and void, conferred no rights and brought no lands within the operation of the grant. But it is not admitted that by reason of the enforced delay in the location and construction of this portion of the line, the company forfeited the power to comply with the terms of its compact with the United States to complete its road from a point on Lake Superior to Puget Sound.

It is submitted that the grant of the franchise to be a corporation, to build the road and the grant of lands and right of way to aid in its construction

are, under the terms of the act, grants upon conditions subsequent, and that before advantage can be taken of a breach of the conditions, a forfeiture must have been declared by legislative declaration, or established by a judicial proceeding instituted under congressional authority for that purpose.

The whole claim of a forfeiture of the franchise to locate and construct the road between Thomson and Ashland is based upon the provisions of section 8 of the act of July 2, 1864, but the language of that section is "that *each and every grant, right and privilege* herein are so made and given to, and accepted by, said Northern Pacific Railroad Company, upon and subject to the following conditions. * * *"

It will be conceded by counsel for the government that if the grant of lands had attached by definite location within the time limited for the construction of the road and after the title had so vested, there had been a breach of condition subsequent, a declaration of forfeiture would be a prerequisite to an enforcement of the condition. This principle was announced by this court in Schulenberg vs. Harriman, 21 Wall. 44, and that decision has been folllowed in a long line of cases. But counsel insists that a different rule applies as to the enforcement of the condition attached to the grant of power to locate and construct the road, and it is insisted that as applied to this grant the condition is self-executing. But the argument proves too much. If the condition attached to the grant of power to locate and construct the road be self-executing, it must necessarily follow that the same

condition annexed to the grant of corporate existence is in like manner self-executing, and the argument of counsel leads to the conclusion that, because the company was unable within the time fixed by its charter to complete the road to Ashland, *ipso facto* upon the lapse of the time specified for the completion of the road, the company lost not only the power to locate and construct that portion of its line from Thomson to Ashland, but lost as well its franchise of corporate entity, and was thereby dissolved, and thus the grant of lands, the title to which had vested, would have been forfeited without a declaration of forfeiture, contrary to the intent of congress.

The mere fact that the condition attached to the grant of lands is contained in the same language as the condition attached to the grant of power to be a corporation and of power to locate and construct the road is in itself convincing evidence that, if the condition is not self-executing as respects the grant of lands, it is not self-executing as respects the grants of the corporate entity, and of the franchise to locate and maintain the road.

But the identical question here presented has been passed upon by this court. In *Bybee v. Oregon & California Railroad Co.*, 139 U S. 663, the defendant railroad company claimed title to a strip of land for right of way purposes under a grant by act of congress. By the terms of the act the road was required to be completed by July 1, 1880. The act further provided that in case the road should not be completed within the time specified, "this

act shall be null and void." The road was not located or constructed over the premises in controversy until after July 1, 1880, and it was contended that the provision that the act should be null and void in the event that the road was not completed within the time limited was self-executing and that by lapse of time the company forfeited its right to construct its road. The court reviews the authorities and concludes:

> "Upon the whole we think there is nothing to distinguish this case from *Schulenberg v. Harriman*, and that the learned judge of the court below was correct in holding that the railroad company had not forfeited its right to construct its road by failure to complete the same within the time limited."

In the case just referred to the counsel for the plaintiff relied upon certain decisions by the Court of Appeals of New York, where the court held that certain conditions annexed to grants of franchises were self-executing. This court declined to follow these decisions, and cited decisions by the supreme courts of Massachusetts and Louisiana, holding the contrary doctrine, as stating the better rule.

Since the decision by this court in the Bybee case, the New York Court of Appeals have materially modified their former holdings and in the Matter of New York and Long Island Bridge Co., 148 N. Y. 540, state the rule to be that, while it is competent for the legislature to annex a self-executing condition to a grant, strong and unmistakable language must be employed to justify a court in declar-

ing such intention, and the conclusion is reached that the words "all rights and privileges granted hereby shall be null and void" do not render the condition self-executing.

Section 8 of the Northern Pacific charter, declaring that the several grants are upon the conditions named, is followed by section 9, as follows:

> "*And be it further enacted*, That the United States make the several conditioned grants herein, and that the said Northern Pacific Railroad Company accept the same, upon the further condition that if the said company make any breach of the conditions hereof, and allow the same to continue for upwards of one year, then, in such case, at any time hereafter, the United States, by its congress, may do any and all acts and things which may be needful and necessary to insure a speedy completion of said road."

It is, therefore, clear beyond question from the very language of the act that congress did not intend that any forfeiture should take place in the absence of an express declaration.

It was also urged by counsel for the government that in the suit brought by the United States to set aside a patent upon a single tract of land, it is competent for the court to consider the question of the title of the Northern Pacific Company to the whole of its land grant and the right of the company to exercise the franchises conferred by its charter; in other words it was insisted that this suit may be enlarged into a proceeding to decree and enforce a forfeiture of all the grants conferred upon the company because a portion of the line was not com-

pleted within the time limited by the acts of congress. But the rule is well settled that forfeitures for breach of conditions subsequent, annexed to grants, can only be enforced by the grantor, and it rests with congress to determine that advantage shall be taken of a breach of condition and the attorney general cannot act for congress in this behalf.

In *United States v. Repentigny,* 5 Wall. 211-268, this court said:

> "A legislative act directing the possession and appropriation of the land is equivalent to office found. The mode of asserting or of assuming the forfeited grant, *is subject to the legislative authority of the government.* It may be after judicial investigation, or by taking possession directly, under the authority of the government, without these preliminary proceedings."

In *United States v. Southern Pacific R. R. Co.,* 146 U. S. 570-606, the court was considering the question of the forfeiture of a grant to the Atlantic & Pacific Company and said:

> "No power but that of congress could interfere with this right of the Atlantic & Pacific. No one but the grantor can raise the question of a breach of a condition subsequent."

See also: *Schulenberg v. Harriman,* 21 Wall. 44; *Farnsworth v. R. R. Co.,* 92 U. S. 49-67; *McMicken v. U. S.,* 97 U. S. 204.

And in any view of the case, any forfeiture which might have been claimed by the United States has been long since waived by subsequent

legislation and by the construction and operation of the road with the knowledge and consent of the government.

II.

Was the Power of the Company Exhausted When Its Line Touched the Lake at Superior?

The provisions of the act of congress of July 2, 1864, contained in the first section, designating the route of the proposed railroad, are as follows:

> "And said corporation is hereby authorized and empowered to lay out, locate, construct, furnish, maintain and enjoy a continuous railroad and telegraph line, with the appurtenances, namely, beginning at a point on Lake Superior, in the state of Minnesota or Wisconsin; thence westerly by the most eligible railroad route as shall be determined by said company, within the territory of the United States, on a line north of the forty-fifth degree of latitude, to some point on Puget's Sound." * * *

It is plain from the express terms of the act that the route between the termini was left to the determination of the company, subject, of course, to the implied requirement that it should be as reasonably direct as the topography of the country would allow, and subject to the authority of the land department to reject a location not conforming to this implied requirement. *Buttz v. Northern Pacific Railroad Company*, 119 U. S. 55; *St. Paul and Pacific Railroad Company v. Northern Pacific Railroad Company*, 139 U. S. 1.

And it seems equally plain that the selection of

the termini, subject to the limitations prescribed by the act, was, in like manner, delegated to the company.

The reasons for not fixing the starting point of the road on Lake Superior are well expressed in the statement of Mr. Sweat, member of congress from Maine, in his advocacy of the Northern Pacific bill before the house of representatives. Mr. Sweat said:

> "For obvious reasons it was determined by your committee not to specify in the bill the precise starting point on Lake Superior, or the place of termination on Puget Sound. To fix these irrevocably by the action of congress would place it in the power of speculators to purchase all the lands adjacent, and by an exorbitant price for them subject the corporation to unjust and heavy burdens in the commencement of their undertaking. Good policy and the interests of the country suggest the propriety of leaving the exact termini of the road undefined by the bill, and to be hereafter selected by the corporation."
>
> Congressional Globe, p. 1699, First Session, Thirty-eighth Congress.

And from the language of the act itself it is clear that congress, having failed to fix the point on Lake Superior from which the road should run, must be held to have intended to confer upon the corporation the power to fix the point. And this conclusion is amply sustained by the authorities.

In *Fall River Iron Works Company v. Old Colony and Fall River Railroad Company*, 5 Allen, 221, an injunction was sought against the defendand railroad company to restrain it from con-

structing its road across plaintiff's land. It was contended that the route adopted by the company was not authorized by its charter. By the terms of its charter, the opinion states, the defendant company was empowered to locate, construct and maintain a railroad "from a point at or near the present terminus of the track of the defendant's railroad in Fall River, in a southerly direction to the line of the state of Rhode Island, to connect with a railroad to be constructed from Newport, in the state of Rhode Island, to the line of the state of Massachusetts." It appeared that the road as located commenced at a point 2,475 feet north of the terminus of the road mentioned in the charter, and extended thence southerly across plaintiff's land. It was contended that the location was not established as contemplated by the charter.

The court said:

> "In seeking for a correct and just exposition of this clause of the statute, the first and most obvious suggestion is, that the legislature did not intend to fix with absolute certainty and precision the point of departure for the new road which the defendants were authorized to build. In using language which was so vague and indefinite as to leave open for future determination the location of this point, it is clear that, owing to the nature of the ground, or for some other sufficient reason, it was not deemed expedient or necessary to fix it with accuracy. It is also clear that in thus omitting to designate it,, it was their intention to delegate the power of locating it definitely to the defendants or their agents, and to vest in them the exercise of the needful judgment and discretion to carry into effect the authority which they intended to grant. It follows, that unless

> the defendants have clearly exceeded the limits of this discretion, and have acted either in bad faith or in disregard of the just limits which, by a reasonable construction of the words of the statute, should be put on their power to fix the *terminus a quo*, they cannot be deemed to have invaded the plaintiff's rights, or be held amenable to process restraining them from prosecuting their work and constructing their road according to the plan and location set out and described in the bill."

And it was held that the location was proper.

See also Parke's Appeal, 64 Pa. St., 137. *U. S. v. Northern Pacific R. Co.*, 41 Fed. Rep. 842.

It is submitted that the company had authority to locate the terminus or point of beginning of its road at any point on Lake Superior in Minnesota or Wisconsin. This authority was doubtless subject to the supervision of the land department to the extent that the department was authorized to reject an arbitrary and capricious location of the starting point clearly not within the contemplation of the act. The purpose of the grant being to establish connection between the waterways of the great lakes and Puget's Sound, a location of the terminus at a point on the shore of Lake Superior, shut off from access to the open waters by shoals or reefs, might properly have been rejected, and the company have been compelled to relocate its point of beginning. But this implied restriction upon the authority delegated to the company to fix its starting point is the only limitation other than that contained in the words of the act that this point should be on Lake Superior in Minnesota or Wisconsin.

When the company had thus exercised its right of selection, and had fixed its point of beginning, it had full authority, under the express terms of he act, to locate its line westward from such point by the most eligible route, to be "determined by said company." The company having established its point of beginning, if the adoption of the most eligible route westward required the line to touch the lake a second time it is difficult to conceive from what source the department obtains authority arbitrarily to fix the terminus at such second point, when the terminus had been already fixed by the company by a lawful exercise of the power conferred upon it. If the adoption of the most eligible route from the point of beginning, established by the company, had made it necessary for the line to touch the lake at a second point, and this point had been on a barren shore, shut off from accesss to the open lake, and manifestly such a point as could not have been contemplated by the act as the terminus of the road,the argument is reduced to an absurdity. But, nevertheless, under such a location, the line, having touched the lake at a point west of its established terminus, would have been as much within the secretary's technical construction as is the line actually constructed, which starts as Ashland and touches the lake again at Superior.

It follows from the reasoning of the secretary that if the company had located and built from Ashland and, instead of touching at Superior, had avoided the shore line at that point by five or ten miles, the terms of the grant would have been fully

satisfied, and no objection could have been urged against such location.

But nothing can be found in the language of the act which tends in any degree to support the conclusion of the secretary that the company was prohibited from touching the lake at more than one point. Indeed, there is evidence in the language of the act that this was contemplated. The company was, by the terms of the act, authorized to commence at some point in Wisconsin, and a glance at the map will show that the most direct route from any point on the open lake to Puget's Sound must of necessity touch that portion of the lake included in St. Louis or Pokegama Bays, and that, too, at some point far distant from the natural channels of navigation, and which could never have been contemplated as the terminus of this transcontinental line.

As a matter of fact, when the road was actually located, it was found necessary, because of the character of the country, to swing south of this arm of the lake, but exact information as to facts of this nature, established only after careful surveys, cannot be presumed to have been before congress when the act was passed.

It is insisted by the Secretary of the Interior that it was the intention of congress that the proposed railroad should commence at the extreme western end of Lake Superior, either at Duluth or Superior, but there is nothing in the act or in the history of the times to support this conclusion. When the act was passed there was no city of importance on

the shore of Lake Superior in Minnesota or Wisconsin. Superior had a population of only 500, and Duluth was a hamlet of less than 200 souls.

It is matter of common knowledge that the contest has been sharp between the cities of Ashland, Bayfield, Washburn, Superior and Duluth, as to which is destined to become the principal port on Lake Superior, and this question, if settled at all, has not been settled long.

It was the intention of congress, by the grant to the Northern Pacific Railroad Company, to insure a railroad from such point on the lake as would best accommodate an interchange of traffic with the railroads from the east and south, as well as with the shipping of the lakes. It is manifest that in 1864 there were many reasons for supposing that the principal lake port would be established at some point on the land-locked Chequamegon Bay, which had then been fixed as the northern terminus of two railroads, to aid in the construction of which lands had been granted to the state of Wisconsin. (13 Stat. 67). The natural harbors of Chequamegon Bay were also many hours nearer to eastern ports by the waterways than were Duluth and Superior. These manifest considerations were matters which congress had in view when the granting act was passed, and the conditions remained the same when the company filed its map of general route in 1870 from the mouth of the Montreal river, and its map of definite location in 1882 from a point near Ashland.

It is submitted that without authority upon the

subject it is clear that when the Northern Pacific Company established its terminus on Lake Superior, it had full authority to touch the shore a second time if the adoption of the most eligible route from such terminus to Puget's Sound required it. Authority, however, is not wanting.

In *Boston and Providence Railroad Corporation v. Midland Railroad Company,* 1 Gray, 340, it appeared that the Midland Company was authorized by statute to locate and construct a railroad "commencing at some convenient point on the Norfolk County Railroad; thence through the southerly part of Dedham; thence through or near the westerly part of the towns of Canton and Milton."

The point decided by the court is clear, without further statement, from the following extract from the opinion (p. 367):

> "Again; it is argued that the location, by the act, is to commence at a point on the Norfolk County Railroad, and thence to depart from that line and run thence through the southerly part of Dedham, whereas, in fact, it runs from the *terminus a quo* more than two miles, not from, but on and over the actual location of the Norfolk County Railroad. This, we think, is a misconstruction of the language of the act. It commences at some convenient point on the Norfolk County Railroad in South Dedham, *thence*, not from that railroad or the line of that railroad, but from a point on that railroad, which it may do, if it continues to run from that point three miles on that railroad, and so must run through the southerly part of Dedham, if that railroad is in the southerly part of Dedham, which the act implies."

See also Parke's Appeal, 64 Pa. St. 137; *Kan-*

sas City R. Co. v. Attorney General, 118 U. S. 682.

The secretary of the interior lays much stress in his argument, upon the case of Atlantic and Pacific Railroad Company, 4 Land Decisions, 458. By act of congress of July 27, 1866 (14 Stat. 292), lands were granted to this company to aid in building a railroad upon a route defined by the act as follows:

> "Beginning at or near the town of Springfield in the state of Missouri, thence to the western boundary line of said state, and thence, by the most eligible railroad route, as shall be determined by said company, to a point on the Canadian river, thence to the town of Albuquerque on the river del Norte, and thence, by way of Agua Frio, or other suitable pass, to the headwaters of the Colorado Chiquito and thence, along the thirty-fifth parallel of latitude, as near as may be found most suitable for a railway route, to the Colorado river, at such point as may be selected by said company for crossing; thence, *by the most practicable and eligible route, to the Pacific.*"

In 1872, 1873 and 1874 maps of definite location of sections of the route were filed which carried the definite location of the line to San Buenaventura, on the Pacific ocean, and two other maps which carried the line northward 380 miles to San Francisco. These maps were approved, but no portion of the road from San Buenaventura to San Francisco was ever built.

In 1886, the secretary of the interior laid a rule on the company to show cause why the approval of the maps of definite location from San Buenaven-

tura to San Francisco should not be revoked, and it was held that the approval had been improperly allowed, and that the grant to the company was measured by the most eligible and practicable route form the point of beginning, by way of the courses mentioned in the act, to the Pacific ocean. It was said that it was not within the purpose of the act that the line, after reaching its terminus, the Pacific ocean, should skirt its shores for 380 miles; that when the Pacific ocean was reached the terms of the act were satisfied.

It is sought to draw a parallel between this case and the case at bar but they are widely different.

The Northern Pacific act provides for a railroad, not from Lake Superior, but beginning at a point on Lake Superior. *Boston, etc., Railroad Corporation v. Midland Railroad Company, supra.*

The Atlantic and Pacific grant contemplated a railroad from Springfield, Missouri, via the points mentioned in the act to the junction of the thirty-fifth parallel of latitude and the Colorado river, thence by the most eligible and practicable route to the Pacific ocean. Under these limitations it is manifest that even if the company had authority to fix its terminus as far north as San Francisco, it had no authority to locate its line by way of San Buenaventura.

> "When the termini of a railroad are mentioned, for whose construction a grant is made, the extent of which is dependent upon the distance between those points, the road should be constructed upon the most direct and practicable line. No unnecessary deviation from such line would be within the contemplation of the

> grantor, and would be rejected as not in accordance with the grant."
>
> *St. Paul & Pacific Railroad Company v. Northern Pacific Railroad Company,* 139 U. S., 1-13.

It is manifest, therefore, that the limitations of its granting act that the road should extend from the specified point on the Colorado river *by the most practicable and eligible route to the Pacific ocean,* required by the Atlantic and Pacific Company to locate its road by the most *direct* route to the Pacific Ocean, and that it was permitted neither to make a gigantic bow as it attempted to do nor to diverge from a reasonably direct line so as to strike the ocean at an angle for the purpose of increasing its grant.

The distinction between the cases lies in the fact that the coast line, on which the Atlantic and Pacific must find its terminus, lay at right angles to the course of the road proposed, while the shore line, on which the Northern Pacific company must fix the point of beginning, lay parallel to the general course of its line.

In the former case, the choice of the terminus was restrained by the limitation that the company must build from the Colorado river to this coast line by the most practicable and eligible, and therefore, the direct route; in the latter case *the choice of the point* of beginning was restrained by the limitation that it should be on this shore line in Minnesota or Wisconsin.

It is plain that the Atlantic and Pacific Company could, and, if it complied with the terms of its act, must of necessity reach a point on the Pacific ocean suitable for a terminus, without touching the coast at any other point, whereas, as has been shown, it was not reasonably to be anticipated that the Northern Pacific Company could select such a point on Lake Superior, in the state of Wisconsin, as could reasonably be said to have been contemplated as a terminus by the act of 1864, and construct its road westward towards Puget Sound without touching the lake a second time.

And it is important to notice the circumstances under which the Northern Pacific Railroad Company made the slight change in its route, as defined by the map of general route filed August 13, 1870, so as to touch the city of Superior by its map of definite location filed July 6, 1882.

The consent of the state of Wisconsin was conferred on the company to build its railroad and telegraph line under the act of congress through the state, by an act approved April 10, 1865, and no conditions were annexed as to the location or route of the road. Acting under the consent thus conferred, the company filed its map of general route August 13, 1870, designating a line commencing at the mouth of the Montreal river and extending across the state of Wisconsin, but not touching the lake at Superior City.

This act of the Wisconsin legislature of April 10, 1865, was, on the 10th day of March, 1870, amended by attaching certain conditions, immaterial here, to

the consent theretofore conferred. (Case No. 408, Transcript, pp. 121-122.)

On the 25th day of March, 1872, the Wisconsin legislature passed an act amending the two previous acts and made the consent theretofore conferred conditional by enacting as follows:

> "Any consent heretofore given by the legislature of this state to the Northern Pacific Railroad Company to construct, operate and maintain a railroad and telegraph line in the state of Wisconsin, is hereby made subject to the further conditions, that the said Northern Pacific Railroad company shall construct and forever maintain and operate to some point on the southwesterly shore of the Bay of Superior, between the Nemadji river and Connor's Point, a line of railroad, connecting with and continuous to the main line of said Northern Pacific Railroad, by a route running south of St. Louis river from the junction of said Northern Pacific Railroad with the Lake Superior and Mississppi Railroad, intersecting the western boundary of Wisconsin at some point between the St. Louis and Nemadji rivers, and running thence all the way in Wisconsin between said rivers, and also shall construct and forever maintain, at some place where said railroad shall touch the said Bay of Superior, between the said Nemadji river and Connor's Point, sufficient docks or piers, suitable and convenient for the transfer of passengers and freight from its cars on said road to lake-going craft, and from said craft to said cars, and also, shall establish and forever maintain at some place between the said Nemadji river and Connor's Point, a sufficient depot for the accommodation of passengers. And until the said Northern Pacific Railroad Company shall construct and operate such railroad to the southwesterly shore of the Bay of Superior as aforesaid, and shall so construct said docks or

> piers and the said depot, it shall not be lawful for the said company to construct or maintain or operate any other railroad in Wisconsin." (Case No. 408, Transcript, pp. 122-123.)

Thus it will be seen that the action of the Northern Pacific Railroad Company in altering the line of its road as defined by the map of general route so that the same touched the lake at Superior City was not the result of any vacillation of purpose, but was in obedience to the positive requirements of the state of Wisconsin.

This act and the considerations which induced its passage are items in the history of the times which are important in this case. If, as is contended, the Northern Pacific Company had fixed its eastern terminus at Duluth by consolidation with the Lake Superior & Mississippi Company, and was thereby precluded from extending its line eastward, it could not act under the consent conferred by the state of Wisconsin and an act attaching conditions to this consent was an idle thing.

III.

Did the Northern Pacific Company Effect a Consolidation with the Lake Superior Company Within the Meaning of Section 3, of the Act of July 2, 1864?

By the decision of the secretary of the interior of August 27, 1896, (23 L. D., 204), it was held that

the purchase of the half interest in that portion of the road of the Lake Superior and Mississippi Company extending from Thomson Junction to Duluth, and the joint use and operation of this portion of road by the two companies constituted a consolidation, confederation and association, between the companies within the meaning of sec. 3, of the Northern Pacific act of July 2, 1864, and that thereby Duluth became fixed as the point of beginning of the Northern Pacific Railroad on Lake Superior.

The provisions of sec. 3, under which it is claimed that a consolidation was effected, are as follows:

> "*Provided*, That if said route shall be found upon the line of any other railroad route, to aid in the construction of which lands have been heretofore granted by the United States, as far as the routes are upon the same general line, the amount of land heretofore granted shall be deducted from the amount granted by this act; *Provided further*, That the railroad company receiving the previous grant of land may assign their interest to said Northern Pacific Railroad Company, or may consolidate, confederate and associate with said company upon the terms named in the first section of this act."

Where the line of the proposed railroad was found on the same general route as that of another land grant road, one of three courses was open to the companies

First. Both roads might be constructed without reference to each other; but, inasmuch as it was not the policy of congress to make two grants for two roads between the same points, it was provided that the amount of the earlier grant should be deducted

from the lands granted to the Northern Pacific Railroad Company.

Second. The company receiving the earlier grant might assign its interest to the Northern Pacific Company. This authority was doubtless given in the interest of the prior land grant company, as well as in the interest of the Northern Pacific. If, when the routes of the two roads were laid down, the company having the earlier grant should find its proposed road paralleled for a considerable distance by the transcontinental line of the Northern Pacific, it would be doubtful policy for such company to construct this portion of its line. If its grant, however, required a continuous road between specified termini, it might become subject to a forfeiture for a failure to construct the road the full distance. The provision for assignment of the land grant plainly contemplates the construction of a single road over that portion of the lines which should be found upon the same general route. By this means the Northern Pacific company would receive its full grant of lands and the assigning company would be relieved from its obligation to reach the terminus specified in its grant, and divide its earnings with a competing line.

By the adoption of this course the two corporations would retain their individual identity and the Northern Pacific Company would be entitled to its full grant of lands, unaffected by a conflict with the prior grant.

Third. The last course contemplated by the act,

and the one which it is claimed was adopted, was that of consolidation. But it is to be observed that the "consolidation, confederation and association" provided for is "upon the terms named in the first section of this act." The first section provides:

> "Be it enacted by the Senate and House of Representatives of the United States of America, in congress assembled, that Richard D. Rice (and others) and all such other persons who shall or may be associated with them, and their successors, are hereby created and erected into a body corporate and politic, in deed and in law, by the name, style and title of the 'Northern Pacific Railroad Company,' and by that name shall have perpetual succession, and shall be able to sue and be sued, plead and be impleaded, defend and be defended, in all courts of law and equity within the United States and may make and have a common seal."

The "terms named" must be found in the language quoted.

A consolidation, confederation and association upon the terms named would effect an amalgamation of the two companies into one, for it is provided that the persons named in the act and *all such other persons who shall or may be associated with them,* are created and erected into a body corporate to be known as the Northern Pacific Railroad Company. By such a consolidation the stockholders of the consolidating company would become the associates of the members of the Northern Pacific Company; the two corporations would become merged, the interests of the several stockholders would be identical and the Northern Pacific Company receiving the full grant would hold it for the benefit of the mem-

bers of the consolidating corporation as well as for the benefit of its own original members.

It is apparent, however, under any construction of the first section, that the two methods provided by its charter, by means of which the Northern Pacific Railroad Company might acquire the lands which would otherwise have been excepted from its grant, were both authorized with the single object of insuring a full grant to the Northern Pacific Company, and of avoiding complications in its adjustment. This is plain from the fact that neither an assignment nor a consolidation was authorized except in the event of there being a prior grant of lands to another company whose line should be upon the same general route as that of the Northern Pacific Railroad.

The purpose of the consolidation authorized by the act being to unify the interests of the two companies *in the lands* which would otherwise be excepted from the Northern Pacific grant, it is difficult to conceive how such transactions as were had between the Northern Pacific Railroad Company and the Lake Superior & Mississippi Railroad Company, which left each company existing as a separate and distinct corporation, and did not affect, in the slightest degree, their interests in their respective land grants, can be held to be a consolidation within the meaning of the act.

Aside from the considerations just mentioned, which, it is submitted, show conclusively that a consolidation in the sense of an association of stockholders, and a merger of corporations, and that

alone, was contemplated, the words "consolidate, confederate and associate," standing by themselves, demand the construction which we have shown is required by the context.

In Morawetz on Private Corporations, vol. 2, sec. 939, it is said:

> "There is no doubt that the general effect of a consolidation is the formation of one corporation by the shareholders of several corporations, and the dissolution of the latter as originally constituted."

The author bases a further statement on the authority of *Houston, etc., R. R. Co. v. Shirley,* 54 Tex. 125, as follows:

> "The distinguishing feature of a 'consolidation' is the union of the shareholders of two companies, thereby forming one company. This is essentially different from the purchase by a corporation of the property and concerns of another company at a foreclosure sale; and the fact that the company whose property was sold was declared by statute to be 'merged and consolidated' with the purchasing company would make no difference."

See also: *Clearwater v. Meredith,* 1 Wall| 25-40; *Shields v. Ohio,* 95 U. S. 319; *Railroad Co. v. Georgia,* 98 U. S. 359.

And this conclusion becomes irresistible when the purpose of the Northern Pacific grant is considered. Congress made this grant to insure a continuous line of road from a Lake Superior port to Puget Sound, to be owned by one company and operated under one management and subject to the demand of the United States for the transportation

of the mails and munitions of war. The road contemplated was a road to be owned and operated as a unit and not to be composed of fragments owned in whole or in part by other companies and leased or held in common by the corporation created by congress. With this purpose in view the consolidation authorized was required to be upon the terms named in section one of the act, under which the stockholders of the consolidating company would become members of the corporate body created by congress, and the Northern Pacific Railroad Company would become the *owner* of the whole road.

The argument of the secretary that these two companies effected a consolidation, besides passing over the qualification that the consolidation authorized must be upon the terms named in section one, and leaving out of consideration the manifest purpose of the consolidation contemplated, finally reaches its conclusion upon an assumption which is wholly false.

It is declared that except for the authority conferred in its charter to consolidate, there was a total want of power in the Northern Pacific Company to purchase a half interest in the line from Thomson Junction to Duluth; and that from the fact that the company is to be presumed to have been acting within its powers, it must follow by presumption that this purchase was under the authority to consolidate conferred by the granting act.

This argument, however, avoids any mention of the provisions of the act of the legislature of Minne-

sota of March 2, 1865 (Case No. 121, Transcript, pp. 36-37; Case No. 408, Transcript, pp. 118-120), conferring the consent of the state of Minnesota for the construction of the Northern Pacific Railroad through that state, which consent was required by sec. 18 of the act of July 2, 1864. This act of the Minnesota legislature, after conferring authority to construct the road as proposed, imposed the following conditions:

> "*Provided*, That should the said company elect to make the eastern terminus of said road east of the eastern boundary of the state of Minnesota, then and in that case, they shall construct, or cause to be constructed, a line of railroad from the said main line to the navigable waters of Lake Superior within the state of Minnesota, of the same gauge as said main line, for which purpose the same powers, rights and privileges are hereby granted to said company as they have or may have to construct said main line within the state of Minnesota."

By virtue of the act imposing the condition the Northern Pacific Railroad Company not only received the power to maintain and operate a line to Duluth, separate and distinct from its main line, but its authority to maintain its line across the state of Minnesota was dependent upon its compliance with this requirement. And when it is considered that less than two years before, in August, 1870, the company had put itself on record in the matter of its point of beginning on the lake, by filing a map of general route from the Montreal river, the facts, instead of supporting the proposition that a consolidation was effected, tend rather to the conclusion that

the company had fixed its point of beginning east of the eastern boundary of the state of Minnesota. The company has never claimed an acre of land by virtue of the line to Duluth (Case No. 408, Transcript p. 149), and its maintenance and operation of this line without such a claim is ample evidence that it was held and operated under the powers conferred by the state of Minnesota, for the purpose of complying with the requirement of that state, and that this branch was not, and was not intended to be, a part of the main line contemplated by the act of congress.

There can be no doubt of the authority of the Northern Pacific Railroad Company under the provisions of the Minnesota statute to acquire by purchase a half interest in the line from Thomson to Duluth.

It has been held by this court that authority to build and construct a line between given points carries with it by necessary implication, the authority to purchase a line already constructed between those points. *Branch v. Jesup,* 106 U. S. 468.

And the purpose of the legislature of Minnesota in imposing this requirement upon the company was subserved as well by the means adopted, as by the unnecessary construction of a parellel line to the waters of Lake Superior at Duluth.

In this connection, the action of the two companies in 1873 is important. In the month of February, in that year, the directors of the Northern Pacific Company were informed that claim was made by the officers of the Lake Superior and Mississippi

Company that the effect of the transactions, evidenced by the deed of January 1, 1872, whereby the Northern Pacific Company purchased a half interest in that portion of the line extending to Duluth, was to fix the eastern terminus of the Northern Pacific Railroad at Duluth; and thereupon, by resolution, the directors of the Northern Pacific Company called upon the Lake Superior & Mississippi Company for an agreement construing the agreement of January 1, 1872, that the same should not be held to intend or have intended, to fix the eastern terminus of the Northern Pacific Railroad at Duluth; and thereafter, on the 2nd day of June, 1873, the Lake Superior & Mississippi Company, by resolution of its board of directors duly adopted, agreed with the Northern Pacific Company that the agreement of January 1, 1872, should not be held to intend or have intended that the eastern terminus of the Northern Pacific Railroad should be, or was, by virtue of said agreement, established at Duluth. (Case No. 408, transcript pp. 140-141).

It is clear that the construction of all these transactions and agreements must be reached in the light not only of the legislation of the state of Minnesota, but in view of all the attendant circumstances, and this construction placed upon the agreement of 1872 by the parties is entitled to the greatest weight. This court said in the case of *Chicago v. Sheldon*, 9 Wall. 50, 54:

> "In cases where the language used by the parties to the contract is indefinite or ambiguous, and hence of doubtful construction, the practical interpretation by the parties them-

selves is entitled to great, if not controlling, influence."

There could be no consolidation unless the parties intended to consolidate, and their solemn declaration, evidenced by an agreement entered into when the conditions were the same as when the Northern Pacific purchased a half interest in this branch road, is sufficient in itself to negative the claim that the companies intended to consolidate under the provisions of the Northern Pacific charter.

But it is suggested in answer to this most natural explanation of the purchase of a half interest in the twenty-six miles of road from Thomson to Duluth, that the grant of power by the state of Minnesota to the Northern Pacific Railroad Company, authorizing it to comply with the condition imposed, by connecting its main line with the waters of Lake Superior, by means of a branch to some point within the state, was void for the reason that the state could not confer a franchise on this company created by congress.

There can be no question of intent or of statutory construction, for the act of the Minnesota legislature is clear and unambiguous, and if the power existed in the state of Minnesota to confer on the company a franchise to build or acquire an interest in this branch road, such a franchise was manifestly conferred.

The Northern Pacific Railroad Company, created by federal authority, comprised an association of persons upon whom had been conferred the fran-

chise to exist as a corporation. It was organized under the constitutional power of congress to establish postroads, regulate commerce and provide for the national defense. It was no migrant. It was in no sense a foreign corporation. *Commonwealth v. Texas & Pacific R. Co.*, 98 Pa. St. 90.

Its domicile was the United States, and it was no more a stranger in the state of Miinnesota than a corporation created by the laws of that state. The consent of the state, obtained in compliance with the act of congress, made lawful the operations of the company within the boundaries of the state.

The United States obtained the authority to create this company and to confer upon it the franchise to build a road to the Pacific by virtue of the grant of powers contained in the constitution, and it must be remembered that before the authority of the state to grant this additional franchise can be challenged, some distinct limitation must be pointed out either in the constitution of the United States, or in the constitution of the state.

The power of the legislature of Minnesota to erect into a domestic corporation the same individuals named in the Northern Pacific charter, under another name or under the same name, and to confer on such corporation a franchise to build a branch road to the waters of Lake Superior, would not be questioned, and it is difficult to understand how or why the hands of the state are tied so that she may not confer on this corporation, already created by congress, the power to build a branch road.

There can be no distinction between the authority

of a state to confer corporate powers upon a federal corporation, and the authority to confer a franchise upon a corporation created by the laws of another state. It is doubted if the power of a state to do the latter has ever been questioned. It is a matter of common knowledge that there is scarcely a railroad in the country touching two or more states that does not rely upon legislation of this character for certain of its franchises, and the authority of the states to grant such franchises has been recognized by this court.

In *Pennsylvania Railroad Company v St. Louis, etc., Rd. Co.,* 118 U. S. 290, there was a controversy as to the jurisdiction. The suit was brought in the circuit court for the district of Indiana by the complainant as the successor of the Terre Haute & Alton Railroad Company, a corporation created by the state of Illinois. It was insisted by the defendants, certain of whom were citizens of Indiana, that the Terre Haute & Alton Company and the complainant, its successor, were Indiana corporations. The question turned upon the effect of certain Indiana legislation and the court held that the Indiana legislation merely *conferred a franchise* on the Illinois corporation to operate a road in Indiana, but did not make it an Indiana corporation. To the same effect is *Goodlett v. Louisville etc. Rd. Co.*, 122 U. S. 391.

In *California v. Pacific Railroad Companies,* 127 U. S. 1, the court considered certain assessments by the state of California of the property of various state railroad corporations, upon which con-

gress had conferred franchises to build and maintain railroads. It was insisted by these companies that their federal franchises had been assessed in bulk with their other property, that these franchises were not taxable by the state and that the whole assessment was therefore void. The claim so made required the court to examine the legislation under which the several companies were created, and from which they derived their franchises.

Speaking of the organization and franchises of the Central Pacific Railroad Company, the court said:

> "Originally, the Central Pacific Railroad Company of California had only power to construct a railroad from Sacramento to the eastern boundary of the state. Congress, by act of 1862, authorized the company (in the words of the act) 'to construct a railroad and telegraph line from the Pacific coast, at or near San Francisco or the navigable waters of the Sacramento river, to the eastern boundary of California, upon the same terms and conditions, in all respects, as are contained in this act for the construction of said railroad and telegraph line first mentioned (the Union Pacific), and to meet and connect with the first mentioned railroad and telegraph line on the eastern boundary of California.' * * * *
>
> "This important grant, though in part collateral, to, was independent of, that made to the company by the state of California, and has ever since been possessed and enjoyed."

The foregoing argument has been presented upon the assumption that there is no provision in the Northern Pacific charter authorizing the company to take this grant of power from the state of Minnesota. But the provisions of the charter must not

be overlooked, and it is submitted that authority is there conferred in express terms to receive and exercise the franchise conferred by the state of Minnesota.

> "Sec. 17. *And be it further enacted,* That the said company is authorized to accept to its own use, any grant, donation, loan, power, franchise, aid or assistance which may be granted to, or conferred upon, said company, by the congress of the United States, by the legislature of any state, or by any corporation, person, or persons; and said corporation is authorized to hold and enjoy such grant, donation, loan, power, franchise, aid, or assistance to its own use for the purpose aforesaid."

The section authorizes the company to accept to its own use any grant, power or franchise which may be conferred upon it by any state, and to hold and enjoy such grant, power or franchise "to its own use for the purpose aforesaid." Manifestly full authority is here given for the very grant of power which the state of Minnesota conferred. What is "the purpose aforesaid"? Clearly not merely the building and operating a line of railroad to the Pacific, for congress had by the act itself conferred every power and franchise required for that purpose. The power of eminent domain was conferred, and it was competent for congress to confer this power within the states as well as within the territories. *Kohl v. United States,* 91 U. S. 367.

The company being fully empowered to do all those things necessary to the mere building and operating a road from Lake Superior to Puget's

Sound, the "purpose aforesaid" cannot be thus narrowly restricted.

In *Winona & St. Peter Rd. Co. v. Barney,* 113 U. S. 618, 625, speaking of the act of 1857, granting lands to the state of Minnesota to aid in the construction of railroads, the court said:

> "The solution of these questions depends, of course, upon the construction given to the acts making the grants; and they are to receive such a construction as will carry out the intent of congress, however difficult it might be to give full effect to the language used if the grants were by instruments of private conveyance. To ascertain that intent we must look to the condition of the country when the acts were passed as well as to the purpose declared on their face, and read all parts of them together."

And the court added:

> "The policy of the government was to keep the public lands open at all times to sale and pre-emption, and thus encourage the settlement of the country, and, at the same time, to advance such settlement by liberal donations to aid in the construction of railways."

And what was true of the purpose of congress in granting lands to the state of Minnesota is pre-eminently true of its purpose in making the grant for a railroad through the wilderness across which it was proposed to build the Northern Pacific Railroad. The principal and indeed the primary purpose of congress in passing this act was to encourage and render possible the settlement and development of a vast domain till then practically unknown and inaccessible. There was but a scanty popula-

tion on the Pacific coast, and little, if any, settlement in the country to be traversed. The conditions existing in 1864 demanded no post route and there was no commerce to be served, but the grant was made and the road was built solely with a view to the changed conditions to be brought about by the means adopted. *U. S. v. Union Pacific R. Co.*, 91 U. S. 72.

The extent of the land grant conferred is itself a sufficient argument that congress did not intend to deprive the company of the necessary means of rendering the construction of its transcontinental line a practicable enterprise. A section of land forty miles distant from a railroad is as worthless as if a thousand miles distant, and but for the construction of branch lines the bulk of the lands granted to aid this great undertaking would have been a burden and not a benefit. And if the Northern Pacific Railroad Company had had no power to construct or to aid in the construction of such roads they would never have been constructed. It is well known that even under the present conditions, the earnings of scarcely a single branch line tributary to the Pacific roads are sufficient to justify their operation, except as feeders for the through lines. As independent enterprises, they could never be maintained.

Finally, independent of the Minnesota legislation and of the provisions of section 17 of the charter, the power to build or acquire by purchase a half interest in the twenty-six miles of road from Thomson Junction to Duluth, to be operated as a

branch line or feeder to the transcontinental road, is a clear incident of the general powers conferred by the charter.

In *Green Bay, etc., R. Co. v. Union Steamboat Co.*, 107 U. S. 98, the supreme court said:

> "The general doctrine upon this subject is now well settled. The character of a corporation, read in connection with the general laws applicable to it, is the measure of its powers, and a contract manifestly beyond those powers will not sustain an action against the corporation. But whatever, under the charter and other general laws, reasonably construed, may fairly be regarded as incidental to the objects for which the corporation is created, is not to be taken as prohibited."

See also *Union Pacific Ry. Co. v. Chicago etc. R. Co.*, 10 U. S. A. 98.

Bearing in mind the purpose for which congress created this corporation and conferred upon it the grant of lands, and bearing in mind that the only way in which that purpose could have been effectuated was by means of such franchises as that conferred by the state of Minnesota, can there be any doubt of the power of the state to grant, or of the company to enjoy, the franchise conferred?

Returning to the first premise in the argument, which, it is claimed, establishes a consolidation, it will be observed that the fact is assumed that the lines of the two roads are found upon the same general route. It is apparent that this is a necessary premise, for only where this condition existed was a consolidation authorized. There is, however,

nothing to support this conclusion thus assumed, except a course of reasoning in a circle.

It is said, first, that the company fixed its point of beginning on Lake Superior at Duluth, and having located to Thomson Junction, it follows that the lines of the two roads were in the same general route. But the fact that the point of beginning was at Duluth depends upon the fact of consolidation, and it is not contended that Duluth was so fixed as the eastern terminus, unless a consolidation is established. The act only authorized a consolidation where the routes of the two roads were on the same general line. This condition required that there should be two points common to both roads, and both of these points, to answer to the conditions of the act, must be points upon the line of the Northern Pacific Railroad located under the act of congress. Thomson Junction was manifestly such a point, but if the Northern Pacific Company acquired an interest in the line to Duluth for the purpose of complying with the Minnesota legislation, Duluth would not be such a point, but, at most, would be a terminus of a branch line. In other words before it can be said that Duluth was on a point on the main line of the Northern Pacific Railroad located and constructed under the act of congress, some fact must appear from which it may be shown that the Company exercised the power of selecting its point of beginning, conferred by the act, in favor of Duluth.

The whole argument loses sight of the fact that everything which the company had done up to this

time was with the manifest intention of establshing its point of beginning near Ashland.

It is submitted, furthermore, that if the Company had seen fit to locate its point of beginning at Duluth this very fact would have precluded it from effecting a consolidation with the Lake Superior & Mississippi Railroad Company. Thomson Junction does not lie on the direct route from Duluth to Puget Sound, and, if the company had filed a map of definite location showing its point of beginning at Duluth, and its course by way of Thomson Junction to Puget Sound, the department would have been instant in its demand for proof that a reasonably direct course westward from Duluth was impracticable because of the conformation of the country, and, in the absence of such proof would have rejected such a map, and properly under the authorities cited in an earlier part of this brief.

Upon another ground it is earnestly submitted that the lines of the Northern Pacific Company and the Lake Superior & Mississippi Company cannot be said to be upon the same general route. The purpose with which the first proviso was inserted in the Northern Pacific act was to guard against bestowing land grant aid for the construction of an unnecessary piece of road. It was against the policy of congress to encourage the building of a road to parallel and compete with another road already constructed or assured. But it provided for a deduction from the Northern Pacific grant only where the route of another company having an earlier grant was found upon the same

general line. What did congress mean by the words "Same general line?" Manifestly, if two roads lay parallel for a distance of one mile or two miles when approaching a common terminus, and then diverged, the routes could not be said to be on the same general line within the meaning of the proviso. The meaning of the language must be found in the purpose for which it was employed. As has been said, that purpose was to avoid granting aid to two parallel and competing lines, either of which could accommodate the traffic. Where the two roads were found on the same general line, it was provided that the company having the earlier grant might assign to the Northern Pacific Company its interest in the lands which would otherwise be deducted from that company's grant, with the plain purpose of allowing the Northern Pacific Railroad Company to earn its full grant, and contemplating the construction of but one road where the proposed lines were on the same general route. If the routes, Northern Pacific Railroad and the Lake Superior & Mississippi Railroad, from Thomson Junction to Duluth, were on the same general line, an assignment of its land grant by the Lake Superior & Mississippi Company, and its abandonment of construction north of Thomson, would have fixed its terminus in the pine barrens only twenty-six miles from the waters of Lake Superior. It is true that at this point passengers and freight could have been transferred to the Northern Pacific Railroad and transported to Duluth over that road; but it is also true that such a makeshift

would not have reasonably accommodated the traffic between St. Paul and Duluth. The inconvenience to passengers would have been unendurable, and the expense of transferring freight would have been vastly greater than the cost of operating the road a few miles farther to a natural terminus on Lake Superior. The two roads, if actually constructed, the one from Duluth by way of Thomson to Puget Sound, and the other from Duluth by way of Thomson to St. Paul, could in no sense be said to be parallel and competing lines. If one had been completed when the other was projected, the fact would not have been considered for an instant in determining the policy of granting aid for the construction of the whole projected line.

The general direction of one road is north and south; the general direction of the other east and west; and the two roads are as far from being on the same general line as it is possible to conceive.

IV.

The Perham Map.

In the interest of Doherty and the United States certain facts are included in the agreed statements relating to a map of the proposed general route of the Northern Pacific Railroad transmitted to the secretary of the interior March 6, 1865, and an argument is based on the filing of this map to support the conclusion that the company manifested

an intention to fix the point of beginning of its road at or near Duluth.

It is agreed that this map marked Exhibt A in the Doherty case and Exhibit 1 in the United States case, is a true and correct copy of a certain map or plat now in the office of the commissioner of the general land office, which said map or plat was transmitted by Josiah Perham, president of the Northern Pacific Railroad Company, to the secretary of the interior on the 6th day of March, 1865. (Case No. 121, transcript p. 53; Case No. 408, transcript p. 103.) With the original map Mr. Perham sent a letter stating that he had designated upon the map the general line of the Northern Pacific Railroad from a point on Lake Superior in *Wisconsin*. (Case No. 121, transcript p. 53; Case No. 408, transcript p. 104.)

Upon receiving this map and letter, the secretary transmitted them to the commissioner, suggesting a withdrawal of lands along the line in Minnesota and *Wisconsin*. (Case No. 121, transcript p. 54;

Upon receipt of the map by the commissioner of the general land office, that officer, upon June 22, 1865, addressed a communication to the secretary, recommending that the map be rejected for the reason that it did not conform to the regulations of the department. (Case No. 121, transcript p. 101; Case No. 408, transcript pp. 105-107.)

Case No. 408, transcript p. 104.)

It further appears in the United States case that there is endorsed upon the said letter the words "Sec'y sustains Comm's refusal," (Case No. 408,

transcript p. 108) and that, except as above stated, the department of the interior has never taken any action under or relative to said map, or made any withdrawals of lands thereunder. (Case No. 408, transcript p. 109.) In the Doherty case it is stipulated that the recommendation of the commissioner was approved by the secretary by endorsement on the letter of the commissioner. (Case No. 121, transcript p. 101.)

An examination of the map discloses two lines extending westward from Lake Superior, and uniting about one hundred miles west of the boundary line between Minnesota and Dakota. The lower of these two lines commences at a point in Wisconsin near the mouth of the Montreal river, but over its whole course is drawn a wavy line of erasure. The upper line commences at a point on Lake Superior at or near the present site of Duluth.

The map presents an alteration apparent upon its face, and, reading the letter of President Perham, written to accompany and explain the map, it will be seen that he describes but one line upon the map, and that line from a point on Lake Superior in *Wisconsin*, by which the conclusion is supported that when the map was filed the only line shown was the lower line from the Montreal river, and that this line was erased and the upper line added at some time after the filing of the map. And this conclusion is much strengthened when it is considered that the letter from the secretary to the commissioner, written after the map was received, and referring to the letter of Mr. Perham, suggests a

withdrawal for ten miles in width in Minnesota and Wisconsin. An examination of the map renders it extremely doubtful if a withdrawal of ten miles on the upper line would reach the Wisconsin boundary.

It seems clear that in order to render the map admissible, the patent alteration should have been explained.

Greenleaf on Evidence, Vol. I, Sec. 564 (15th Ed.).

In any event it is clear that the company acquired no rights whatsoever under this map and that it was ineffectual for any purpose. It appears that the map has never been recognized by the department, but, on the contrary, that it was rejected. The indorsement upon the letter of the commissioner of the general land office of the words "Sec'y sustains Comm's refusal" is sufficient evidence of the fact there stated, even if unsupported by the agreed fact that thereafter the department failed to recognize the map. A public record kept in obedience to the requirements of the law is evidence of the facts therein recited.

In *Galt v. Calloway,* 4 Peters 332, the court said:

> "The register of the land office keeps a record of all entries and surveys, and on his official certificates patents are issued by the government. His records are always under his control, and all entries made in them are made by himself or by a person authorized to act for him. As the records of this office are of great importance to the country, and are kept under the official sanctions of the government, their contents must always be considered, and they

> are always received in courts of justice as evidence of the facts stated."

In any view of the questions just presented, the map is clearly inadmissible in evidence for the reason that no facts are shown conferring any authority on Mr. Perham, as president, to take action on behalf of the company in locating the line of its railroad. On the other hand, it appears by the record that the minutes of the board of directors of the company, from the first meeting of the board, December 7, 1864, up to a date long after the filing of the Perham map, show no action whatever by the board with reference to locating the line. (Case No. 121, transcript p. 100; Case No. 408, transcript p. 108.)

The powers and duties of the president, as prescribed by the by-laws adopted by the company January 11, 1865, give him no such authority as that sought to be exercised. (Case No. 121, transcript p. 100; Case No. 408, transcript pp. 109-110.)

There is no implied authority in the president of a railroad corporation to act for the company in locating its line. "His powers over its business are simply the powers of an agent such as are delegated to him by the directors." 1 *Wood on Railroads*, p. 494.

In *Walworth County Bank v. Farmers' Loan & Trust Company*, 14 Wis. 351, it was held that there was no implied authority in the president of a railroad company, by virtue of his office, to sell 25,000 ties belonging to the company, and that to support a title depending on such a sale, it was essential to prove actual authority in the president.

It is pertinent that in the years 1866, 1867, 1868 and 1869, the Northern Pacific Railroad Company caused exploring and surveying parties to be put into the field for the purpose of ascertaining the most practicable route for a railroad, to be constructed under the provisions of the act of congress, from a point on Lake Superior, in Minnesota or Wisconsin to Puget Sound, and that these parties made surveys of various lines for railroad routes, commencing at about ten different points on Lake Superior and extending westwardly therefrom, and from time to time reported to the board of directors of the company the result of such surveys and explorations. (Case No. 121, transcript p. 38; Case No. 408, transcript p. 110.)

It appears, therefore, that in the year 1865 the directors of the company had acquired no adequate information upon which to base a judgment as to the practicable location of even the general route of the road.

This court has considered this map, and held that it was inoperative as a location of the road. *United States v. Northern Pacific R. R.*, 152 U. S. 248, 292.

See also *Oregon & C. R. R. Co. v. United States*, 77 Fed. Rep. 67.

V.

The Location and Construction of the Northern Pacific Railroad.

But the decision of this case does not depend on whether the filing of the Perham map was author-

ized or unauthorized, or on what vague purposes the company may have had in 1865, when it was without accurate knowledge of the country to be traversed by its railroad. The question is, did the company finally exercise the power conferred upon it to select its point of beginning on the lake, and its line of route westward, and did it select Ashland as that point?

The record facts as to location and construction may be repeated. August, 13, 1870, the company transmitted to the secretary of the interior a map of the general route of its proposed railroad from the mouth of the Montreal river to the Dakota boundary. This map was accepted by the secretary and by him caused to be filed in the office of the commissioner of the general land office. (Case No. 121, transcript pp. 39-40, Exhibit 1; Case No. 408, transcript pp. 123-124, Exhibit 4.)

On May 9, 1882, the company duly adopted its line of definite location from Thomson Junction to a point a few miles west of the Montreal river, and a few miles east of Ashland, and on July 6, 1882, a duly certified and authenticated map of the line of definite location so adopted, was transmitted to the secretary of the interior, who accepted the same and caused it to be filed in the office of the commissioner. (Case No. 121, transcript pp. 42-44, Exhibit 2; Case No. 408, transcript pp. 125-127, Exhibit 6.)

On August 20, 1884, the board of directors of the railroad company adopted a resolution fixing the point of beginning at the city of Ashland, and a cer-

tified copy of this resolution was transmitted to the secretary of the interior, December 3, 1884. The point so fixed as the point of beginning was on the line of definite location of 1882, and about twelve miles west of the most easterly point on this line. (Case No. 121, transcript pp. 47-49; Case No. 408, transcript pp. 133-135.)

Upon receipt of the resolution of the directors fixing the point of beginning at Ashland, the commissioner adopted the terminal so fixed, and prepared a diagram showing the same and the limits of the land grant, with reference thereto, and issued instructions for the adjustment of the grant upon this basis. (Case No. 121, transcript pp. 48-49, Exhibit 3; Case No. 408, transcript p. 134-135, Exhibit 7.)

The railroad from Thomson Junction to Ashland was duly constructed, and, on the recommendation of the commissioners appointed to examine the same, was accepted by the president of the United States, in the years 1881, 1882, 1883 and 1884.

These facts bring the case clearly within the plain construction of the act and of the authorities construing similar acts.

In *Kansas Pacific R. Co. v. Dunmeyer,* 113 U. S., 629-634, the court said:

> "We are of the opinion, that, under this grant, as under many other grants containing the same words or words of the same purport, the act which fixes the time of definite location is the act of filing the map, or plat, of this line in the office of the commissioner of the general land office. * * * The company makes its own preliminary and final surveys by its own

> officers. It selects for itself the precise line on which the road is to be built, and is, by law, bound to report its action by filing its map with the commissioner, or rather in his office."

In *Sioux City, etc., Land Co. v. Griffey*, 143 U. S. 32, the court, commenting on the case last cited, and others, said:

> "The reasoning of these cases is applicable here. The fact that the company has surveyed and staked a line upon the ground does not conclude it. It may survey and stake many, and finally determine the line upon which it will build, by a comparison of the cost and advantages of each and only when by filing its map it has communicated to the government knowledge of its selected line, is it concluded by its action."

See also:

> *Van Wyck v. Knevals*, 106 U. S. 360-366; *Walden v. Knevals*, 114 U. S. 373.

Unless some facts exist showing an exercise of the power to fix the point of beginning at some point other than Ashland, the filing of the map of definite location, followed by the resolution of the board of directors, establishing the point of beginning at Ashland, must be conclusive. And there are no such facts. The company never filed a map to Duluth, and never claimed or intended its branch to that point to be a part of its main line. The company never having exercised the power to establish its point of beginning at Duluth, its definite location and construction to Ashland was competent and is conclusive in determining the location of the road. *Western Pennsylvania R. R. Co.'s Appeal*, 99 Pa. St. 155.

The charge is made in one of the decisions of the secretary above referred to, that the line constructed from Thomson Junction to Ashland was an afterthought, and that no intention existed to construct as far east as Ashland until it became apparent that the line from Bayfield to Superior contemplated by the grant to Wisconsin by the act of May 5, 1864, had been abandoned. The filing of the map of general route in 1870, is an answer to this, and, further, the record shows that the line to Ashland was definitely located, and constructed, several years before the road was contemplated to Puget's Sound.

The road was both located and constructed in sections, which were afterwards united, which course was fully authorized by the granting act. *St. Paul and Pacific Railroad Co. v. Northern Pacific R. Co.*, 139 U. S. 1-19.

Construction was extended west from Thomson Junction to a point fifty-five miles west of Helena, Montana, and east from Wallula Junction, Washington, to the point fifty-five miles west of Helena, and these sections were completed and united in 1883. From a point near Wallula Junction the road was extended to Tacoma, on Puget Sound, in 1885, 1886 and 1887, a distance of more than 300 miles (Case 121, transcript p. 49; Case No. 408, transcript pp. 135-136.)

It is submitted that no sound argument can be based on these facts to support the proposition that the Northern Pacific Company lost its rights from Thomson to Ashland, when that portion of its road

was completed three years before its line over the Cascade mountains.

Denver & Rio Grande R. R. Co. v. Alling, 99 U. S. 463-477.

VI.

The Acceptance of the Map of Definite Location Vested the Grant of Right of Way and is Conclusive

In the cases of *Van Wyck v. Knevals,* 106 U. S. 360; *Kansas Pacific R. Co. v. Dunmeyer,* 113 U. S. 629, and *Walden v Knevals,* 114 U. S. 373, the court considers the question of what constitutes a location and what is necessary to constitute an approval of a map of definite location by the land department. In *Walden v. Knevals,* the court said:

> "Since the decision in that case (*Van Wyck v. Knevals*) the court in *R. Co. v. Dunmeyer,* 113 U. S. 629, has reconsidered the question and come to the same conclusion, the receipt of the map in the land office without objection being considered as equivalent to its acceptance."

The action taken by the secretary and commissioner upon receipt of the map of definite location in 1882 presents a much stronger case than a mere receipt without objection, for the secretary directed and the commissioner made withdrawals of land forty miles on each side of the line from Thomson to Ashland.

There can be no doubt that the map was approved, and the map being approved and the road located, the title to the right of way vested by relation

as of July 2, 1864. *St. Joseph, etc., R. Co. v. Baldwin,* 103 U. S. 426.

The title to the right of way having become vested by the approval of the location, the secretary of the interior was powerless, in 1895, to disturb the rights acquired under the decision of his predecessor. The secretary, in his opinion, seeks to evade this conclusion by declaring that the act of the department in approving the map in 1882 was a nullity because of a want of jurisdiction. It is argued that the department was without jurisdiction to approve the location of a line touching the lake at more than one point. This argument has already been considered, but it finds a further answer in the decision in *Noble v. Union River Logging Co.,* 147 U. S. 162. In this case the following facts appeared:

The Union River Logging Company was incorporated in 1883, under the laws of the territory of Washington, for the purpose, as declared by its articles, of maintaining a logging railroad of about ten miles in length. In 1888 it amended its articles so that its object was declared to be to construct and maintain a railroad and telegraph line over a much longer route, and to carry passengers and freight, and also to carry on a general logging business. For the purpose of acquiring a right of way through the public lands under the provisions of the act of Congress of March 3, 1875, (18 Stat. 482), the company filed in the year 1889, at the district land office, its articles of incorporation,

and other documents required, together with a map showing the route of its road through the public lands. These papers were transmitted to the commissioner and by him to the secretary, who approved them. Subsequently Secretary Noble, who had succeeded Mr. Vilas, by whom the approval had been allowed, entered an order revoking this approval, and, upon a bill in equity being filed to enjoin the secretary and commissioner from executing the order revoking the approval, the defendants answered, that since approval of the map, it had come to their knowledge that the plaintiff company was a mere private logging corporation, and was in no sense a common carrier, and that the act of congress granting the right of way through the public lands did not contemplate such a grant to companies other than common carriers. The hearing being had upon bill and answer, the facts above stated were admitted. It was contended by the defendants that, inasmuch as the plaintiff company was not such a company as was contemplated by the act of 1875, the approval of its map by Secretary Vilas was an act done without jurisdiction and was void. The court held, however, that the question as to the character of the company was properly before Secretary Vilas, and that by his approval of the company's map this question was concluded in its favor. It was held, further, that by virtue of the approval of the map the right of way vested in the company, under the present grant contained in the act of 1875, and the court said:

"A revocation of the approval of the secre-

> tary of the interior, however, by his successor in office, was an attempt to deprive the plaintiff of its property without due process of law, and was, therefore, void."

The parallel between the Noble case and the case at bar is plain. As has been shown, a discretion was committed to the land department to be exercised in accepting or rejecting the location of the Northern Pacific Railroad. As we have shown, the company had authority, under its grant, to select its point of beginning on Lake Superior, and its route from such point westward to Puget's Sound. This authority to select its point of beginning was subject to the authority of the department to require that it should be such a point as was reasonably contemplated by the granting act, and the department could have rejected a selection of a point inaccessible for lake vessels. When the point of beginning was properly selected and approved by the department, the location of the route westward was also subject to the approval of the department to the extent of requiring the road to be located on a reasonably direct line. The judgment approving the selection of the point of beginning and the location of the route necessarily depended upon questions of fact, and the decision of the department upon these questions, and its ultimate approval of the line, must be held to be conclusive, as was the similar decision in the case last considered.

Further, the approval of the company's definite location must be held to be a determination by the executive that the transactions with the Lake Su-

perior & Mississippi Company did not amount to a consolidation, for the conclusion that Ashland was the point of begining must negative the claim that Duluth was such point, and the secretary must have found that Duluth was *not* the point of beginning when he found Ashland was the point.

It appears that, as construction progressed between Thomson Junction and Ashland, this portion of the road was examined in three sections by commissioners appointed for that purpose by the president of the United Sates under Sec. 4 of the Northern Pacific granting act. This section provided that whenever twenty-five consecutive miles of road should be ready for the service contemplated, the president should appoint three commissioners to examine the same, and if it should appear "that twenty-five miles of said railroad and telegraph line have been completed in a good, substantial and workmanlike manner, as in all other respects required by this act, the commissioners shall so report to the president of the United States."

The commissioners appointed duly examined the road constructed from Thomson Junction to Ashland, and reported that the same had been constructed in all respects as required by the act, and, on the recommendation of the secretary of the interior, these reports were approved by President Arthur.

It is submitted that this examination and approval constitutes a finding by a special tribunal, which is conclusive on the question of proper location and construction, under the act. If the ques-

tion whether the road was located and constructed on the line contemplated was a question properly for the determination of the commissioners, there is no doubt but that their decision is final.

And the terms of the act providing that the commissioners shall report whether the railroad has been completed in a good, substantial and workmanlike manner, "as in all other respects required by this act," seem to include the requirements as to location as well as the requirement as to material.

The grant to the Southern Pacific Railroad Company contains a like provision for the examination by commissioners, and, in *United States v. Southern Pacific R. Co.*, 45 Fed. Rep. 596, where a question arose as to whether a certain company was the Southern Pacific Company referred to in the grant, the court held that the appointment of such commissioners and the acceptance of the road constructed upon their report were acts of the United States recognizing the company in question as the Southern Pacific Company, and were binding.

And every presumption which supports the title of the company to its right of way under the grant vested by the approval of its map of definite location supports its title to the adjacent land grant. The same consideration must control the judgment of the court in a suit to cancel a patent for a tract of land presumptively within the limits of the grant, as if the suit were one to vacate and annul the approval of the map of definite location, and thus divest the company of the title of the right of way which it has enjoyed for fifteen years.

The court said in *United States v. Iron Silver Mining Co.*, 128 U. S. 673, 676:

> "The presumption attending the patent, even when directly assailed, that it was issued upon sufficient evidence that the law had been complied with, by the officers of the government charged with the alienation of public lands, can only be overcome by clear and convincing proof."

The reason for this rule is that the patent is evidence of the judgment of the special tribunal to which the matter has been committed.

And the same rule must apply where the judgment of the special tribunal is evidenced by an approval of a map of definite location. But here the judgment of the department is shown by the approval of the map and by the patent itself.

It follows, therefore, that before it can be held that the patents here in question should be canceled, it must be held that the approval of the map of definite location was an act outside of the jurisdiction of the interior department, for if the department had jurisdiction to approve or reject the map, until the approval is set aside the limits of the land grant are defined as well as the grant of right of way.

VII.

The Contemporaneous Construction of the Department of the Interior is Controlling.

The courts have uniformly regarded with the greatest respect the contemporaneous construction placed upon acts of congress by the officers of the executive department to whom was committed the interpretation and execution of those acts. The decisions of the officers charged with the execution of such acts have been regarded as of the highest value as coming from men who are masters of the particular subject and familiar with the history of connected legislation. Where rights of private property have been involved, the courts have gone the full length in applying the reasons for the rule of *stare decisis,* if not the rule itself. The following authorities illustrate the respect paid by the courts to such contemperaneous construction:

> "The officers concerned are usually able men and masters of the subject. Not infrequently they are the draftsmen of the laws they are afterwards called upon to interpret." *U. S. v. McDaniels,* 7 Peters 1.

> "The construction given to a statute by those charged with the duty of executing it is always entitled to the most respectful consideration, and ought not to be overlooked without cogent reasons." *U. S. v. Moore,* 95 U. S. 763.

> "It is a familiar principle of interpretation that, in the case of a doubtful and ambiguous law, the contemporaneous construction of those who have been called upon to carry it into ef-

fect is entitled to great respect." *U. S. v. Pugh,* 99 U. S. 269.

Justice Field, in *Robertson v. Downing,* 127 U. S. 607-13, said:

> "It is interesting to note the growth of this principle in our law. From the time it was first cautiously initiated in 1827, it has grown in strength every time it was again considered by the courts. Impelled by the force of its inherent justice, every judge who has taken it up has stated it more strongly than it was stated before."

In U. S. v. Burlington Ry. C., 98 U S. 334, the court said:

> "Such has been the uniform contsruction given to the acts by all the departments of the government. Patents have been given, bonds issued, mortgages executed and legislation had upon this construction. This uniform action is as potential and as conclusive of the soundness of the construction as if it had been declared by judicial decision. It cannot at this day be called in question."

The learned judge before whom the case of the United States was heard in the circuit court, after pointing out the long continued and contemporaneous construction by the department, holding the terminus to be at Ashland, recognizes the principle that such construction should be entitled to great weight, if the power of the company to build and operate its road to Ashland were doubtful, which he declares not to be the case. The opinion then continues:

> "The rule that grants by the sovereign, including, of course, all grants by the govern-

ment of franchises or of aid to a corporation, shall be strictly construed applies with full force to any case where the right to exercise the franchise to the extent attempted, or the right to aid, has not been conceded, but has been continually denied on the part of the government. But such rule of strict construction, is not fairly applicable to a case where the corporation has done acts and made large expenditures under the assumption that such acts necessitating such expenditures were within the scope of its franchises, being encouraged thereto by affirmative acts by the proper department of the government, confirmative of the same construction of the franchise. In such a case, in the absence of fraud, and after the lapse of years, the question of the correctness of such construction can scarcely be considered an open question." (Case No. 408, transcript p 167.)

And this statement of the law is fully supported by the language of this court in *United States v. Alabama R. R. Co.*, 142 U. S. 615, where it was said:

> "It is a settled doctrine of this court that, in case of ambiguity, the judicial department will lean in favor of a construction given to a statute by the department charged with the execution of such statute, and, if such construction be acted upon for a number of years, will look with disfavor upon any sudden change, whereby parties who have contracted with the government upon the faith of such construction may be prejudiced."

In *Washington & Idaho R. R. v. Coeur d'Alene Ry Co.*, 160 U. S. 77-101, the court said:

> "When a court of law is construing an instrument, whether a public law or a private contract, it is legitimate, if two constructions are farly possible, to adopt that one which equity would favor."

And this contemporaneous construction of the department has been uniform and long continued, and supports the position of the appellees. The map of general route of 1870 was approved and the lands coterminous with the line were withdrawn; the alternate reserved even numbered sections were increased in price to $2.50 per acre, and the United States has reaped the benefit of this increase. The map of definite location was approved and three orders of withdrawal issued. The action of the directors of the company fixing the point of beginning at Ashland was ratified by the commissioner and the withdrawal adjusted accordingly. The construction adopted in 1870 was unquestioned until 1895, and even if the conclusion reached by the secretary in that year could be supported by a logical argument sufficient to render the true construction of the act a matter of doubt, yet the long continued construction, under which the road has been built and private interests have grown up, resting upon the security of the settled interpretation, should be held conclusive at this late day.

C. W. BUNN and
JAMES B. KERR,
Counsel for Defendant in Error and Appellees.

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UNITED STATES *v.* NORTHERN PACIFIC RAILROAD COMPANY.

APPEAL FROM THE CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

No. 408. Argued January 26, 29, 1900. — Decided April 16, 1900.

The important questions of fact and law are substantially the same in this case and in *Doherty* v. *Northern Pacific Railway Company*, *ante*, 421, and that case is followed in this in regard to the questions common to the two cases.

The obvious purpose of this suit was, to have the question of the proper terminus of the company's road determined; and if that terminus was found to be at Ashland, then the complainant would not be entitled to any relief.

Under the act of July 2, 1864, non-completion of the railroad within the time limited did not operate as a forfeiture.

As the bill, in this case, does not allege that it is brought under authority of Congress, for the purpose of enforcing a forfeiture, and does not allege any other legislative act, looking to such an intention, this suit must be regarded as only intended to have the point of the eastern terminus judicially ascertained.

As the evidence and conceded facts failed to show any mistake, fraud or rror, in fact or in law, in the action of the land department in accepting the location of the eastern terminus made by the company, and in issuing the patent in question, the bill was properly dismissed.

Opinion of the Court.

In July, 1898, the United States, by the Attorney General, filed in the Circuit Court of the United States for the District of Minnesota a bill of complaint against the Northern Pacific Railroad Company and others. The object of the suit was to procure the cancellation and annulment of a certain patent granted to the Northern Pacific Railroad Company by the United States on April 22, 1895, for a tract of land lying and being more than ten miles east of Duluth, in the State of Minnesota, and which patent was alleged by the bill to have been inadvertently and mistakenly issued. The case was disposed of on bill, answer and a stipulation of facts. The Circuit Court dismissed the case for want of equity, and the cause was taken on appeal to the Circuit Court of Appeals for the Eighth Circuit, where the decree of the Circuit Court was, on July 10, 1899, affirmed. An appeal was thereupon allowed to this court.

This cause was heard in this court in connection with that of *Andrew Doherty* v. *The Northern Pacific Railway Company*, *ante*, 421. That case came here on a writ of error to the Supreme Court of the State of Wisconsin. The present one is on appeal from the Circuit Court of Appeals for the Eighth Circuit.

Mr. C. W. Russell for the United States.

Mr. James B. Kerr and *Mr. C. W. Bunn* for the Northern Pacific Railway Company.

Mr. M. S. Bright for Doherty submitted on his brief.

Mr. Justice Shiras delivered the opinion of the court.

The important questions of fact and of law were substantially the same in the two cases, and so were the reasoning and conclusions of the respective courts below. In a judgment just entered by this court, the judgment of the Supreme Court of Wisconsin was affirmed, for reasons given in the opinion, a reference to which is deemed to be a sufficient disposition of the questions common to the two cases.

But in the present case there has been raised and argued a proposition not considered in the Supreme Court of Wisconsin, and which is entitled to our attention. Briefly stated, it is that, even if it be conceded that the eastern terminus of the Northern Pacific Railroad Company was lawfully fixed at Ashland, Wisconsin, yet that the land grant of the company had lapsed before any map of the definite location of the railroad east of Duluth, Minnesota, had been filed in the land department; that the company could not lawfully extend the construction of its railroad, so as to entitle it to land under its land grant, after the time limited by act of Congress for the completion of the railroad had fully expired; and that, consequently, the patent to the land described in the bill, being land east of Duluth, was granted mistakenly and improperly.

This contention is based on the language of section 8 of the incorporating act, which is as follows: "That each and every grant, right and privilege herein are so made and given to, and accepted by, said Northern Pacific Railroad Company, upon and subject to the following conditions, namely: That the said company shall commence work upon said road within two years from the approval of this act by the President, and shall complete not less than fifty miles per year after the second year, and shall construct, equip, furnish and complete the whole road by the fourth day of July, Anno Domini eighteen hundred and seventy-six." The time of completion was subsequently extended to July 4, 1880. 14 Stat. 355; 15 Stat. 255.

It is always safe, in approaching a question of this kind, to have regard to the pleadings in the case. Otherwise there is danger that the court and counsel may be drawn into discussions outside of the case actually presented.

On inspection, it appears that the case made by the bill is, that the eastern terminus of the Northern Pacific Railroad became, was and now is at the city of Duluth, State of Minnesota; that the land in question being part and parcel of the public lands of the United States, is more than ten miles east of the said eastern terminus, and not, therefore, within the limits of the grant to said company; that the patent granted to the said company on April 22, 1895, was issued "through

mistake and inadvertence, and under the erroneous impression and mistaken belief that said tract of land was within the limits of the said grant to the Northern Pacific Railroad Company;" and the relief prayed for is that said tract of land be restored to the complainant; that the defendant be required to reconvey all of said tract of land; and that said patent issued by the ministerial officers of the government, so far as the tract of land described in the bill is concerned, be cancelled and annulled; and for such other and further relief as may be just and equitable.

It is true that, in the narrative part of the bill, the eighth section of the incorporating act is quoted, and also there is set forth the several transactions whereby it is alleged Duluth became established as the eastern terminus of the company's road, but there is no intimation that it was the purpose of the bill to have a forfeiture of the company's rights and property judicially ascertained and declared. Indeed, the obvious purpose of the suit was to have the question of the proper terminus of the company's road determined; and it seems a fair deduction from the averments and prayers of the bill that, if that terminus was found to be at Ashland, then the complainant would not be entitled to any relief.

It is argued on behalf of the Government that, even if the bill did not point to a forfeiture as part of the proof that the land had been mistakenly patented, yet that as the defendants, in their answer, had set up, as part of their defence, that the road had been "duly," and "in all respects," constructed in accordance with the law, thereby entitling them to the land in dispute, the issue was thereby widened so as to include the question of forfeiture. We think the Court of Appeals properly disposed of this argument when it said: "This is nothing but a suit to avoid a patent to a single tract of land on the sole ground that the land department erroneously found the eastern terminus of the road to be at Ashland when it was at Duluth. No forfeiture of any of the rights and privileges of the company on account of the delay in the construction of its railroad has been prayed, no issue of forfeiture has been tendered or made by the pleadings, and that question is not here for consideration. It is a

general rule that questions that are not within the issues presented by the pleadings may not be determined by the courts, much less may so important a question as the forfeiture of the rights of a corporation to thousands of miles of railroad and thousands of acres of land under a Congressional grant. Courts have no jurisdiction to consider or determine the question of the forfeiture of a railroad grant until it is raised by direct allegations in a suit instituted by lawful authority for the express purpose of presenting it."

Again, it is contended that when a statutory grant contains on the face of the law a provision that each and every grant, right and privilege are upon condition that the road shall be completed within a certain time, and that time expires without performance of the condition, all future proceedings of the company, even if acquiesced in and approved by executive officers of the Government, in disregard of the forfeiture, are unauthorized, *ultra vires* and forbidden.

In other words, if we understand the position, it is claimed that under section 8 of the act of July 2, 1864, non-completion of the railroad within the time limited of itself operates as a forfeiture; the grant immediately reverts to the Government; and courts must so hold on the simple statement of the fact of non-compliance within the limit. We do not understand this to be a correct statement of the law. In *Schulenberg* v. *Harriman*, 21 Wall. 44, this court was called upon to consider the legal import of such a provision in the act of Congress of June 3, 1856, granting public lands to the State of Wisconsin to aid in the construction of railroads in said State. After providing that the lands should be sold, from time to time, as the construction of the railroad progressed, until the road was completed, it was enacted that "if said road is not completed within ten years no further sales shall be made, and the lands unsold shall revert to the United States."

No part of the road having been built at the expiration of the period limited in the grant, it was claimed that the lands reverted to the United States. It was held by the Circuit Court of the United States for the District of Minnesota that such lands did not *ipso facto* revert to the United States by

mere failure to build the road within the period prescribed by Congress, and that to effect a forfeiture some act on the part of the government evincing an intention to take advantage of such failure was essential; and, on error, that ruling was affirmed by this court, and the following statement of the law was made by Mr. Justice Field in giving the opinion of the court:

"In what manner the reserved right of the grantor for breach of the condition must be asserted so as to restore the estate, depends upon the character of the grant. If it be a private grant, that right must be asserted by entry or its equivalent. If the grant be a public one, it must be asserted by judicial proceedings authorized by law, the equivalent of an inquest of office at common law, finding the fact of forfeiture, and adjudging the restoration of the estate on that ground, or there must be some legislative assertion of ownership of the property for breach of condition, such as an act directing the possession and appropriation of the property, or that it be offered for sale or settlement. At common law the sovereign could not make an entry in person, and, therefore, an office found was necessary to determine the estate; but, as said by this court in a late case, (*United States* v. *Repentigny*, 5 Wall. 286,) 'the mode of asserting or of resuming the forfeited grant is subject to the legislative authority of the Government. It may be after judicial investigation, or by taking possession directly under the authority of the government without these preliminary proceedings.'

"In the present case no action has been taken either by legislative or judicial proceedings to enforce a forfeiture of the estate granted by the act of Congress. The title remains, therefore, in the State as completely as it existed on the day when the title by location of the route of the railroad acquired precision and became attached to the adjoining alternate sections."

In July, 1866, Congress granted unto the California and Oregon Railroad Company a right of way over the public lands. In a subsequent suit between the railroad company and one Bybee, a holder of a mining claim, it was claimed that the railroad company had forfeited and lost its right under the

grant by its failure to complete its road within the time limited in the act; that such failure operated *ipso facto* as a termination of all right to acquire any further interest in any lands not then patented. But it was held by this court, in the words of Mr. Justice Brown: "That in all cases in which the question has been passed upon by this court, the failure to complete the road within the time limited is treated as a condition subsequent, not operating *ipso facto* as a revocation of the grant, but as authorizing the Government itself to take advantage of it, and forfeit the grant by judicial proceedings, or by an act of Congress, resuming title to the land." *Schulenberg* v. *Harriman*, 21 Wall. 44; *Van Wyck* v. *Knevals*, 106 U. S. 360, are then cited, and likewise *St. Louis, &c., Railroad Co.* v. *McGee*, 115 U. S. 743, where it was said by Chief Justice Waite to have been often decided "that lands granted by Congress to aid in the construction of railroads do not revert after condition broken until a forfeiture has been asserted by the United States, either through judicial proceedings instituted under authority of law for that purpose, or through some legislative action legally equivalent to judgment of office found at common law." "Legislation to be sufficient must manifest an intention by Congress to reassert title and to resume possession. As it is to take the place of a suit by the United States to enforce a forfeiture, and judgment therein establishing the right, it should be direct, positive and free from all doubt or ambiguity."

As the bill in this case does not allege that it is brought under authority of Congress for the purpose of enforcing a forfeiture, and does not allege any other legislative act whatever looking to such an intention, it is plain, under the authorities cited, that this suit must be regarded as only intended to have the point of the eastern terminus judicially ascertained. This being so, and that terminus having been found to be at Ashland, it follows that the courts below committed no error in dismissing the bill of complaint.

This view of the case renders it unnecessary for us to consider whether the United States could be estopped by the acts of the executive department, in recognizing the rights of the railroad company as continuing in full force after the expira-

tion of the time named in the statute; or to consider whether the ordinary doctrines of courts of equity, which relieve a contracting party from forfeiture by reason of a failure to complete the contract within a time fixed, when the work is subsequently completed and accepted, would apply to a case like the present. Undoubtedly there would seem to be room for a fair presumption that Congress was aware of the action of the President and of the functionaries of the land department in the particulars before mentioned, and approved of the same. It is not, as put by the counsel of the Government in his able brief, the case of a waiver presumed from mere non-action, but from non-action in the special circumstances disclosed.

As the evidence and conceded facts failed to show any mistake, fraud or error, in fact or in law, in the action of the land department in accepting the location of the eastern terminus made by the company, and in issuing the patent in question, the bill was properly dismissed, and the decree of the Circuit Court of Appeals is

Affirmed.

Mr. Justice McKenna did not take part in the decision of the case.